

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1925 1926

No. 161

JAMES DUIGNAN, APPELLANT,

vs.

**THE UNITED STATES OF AMERICA AND PALL MALL
REALTY CORPORATION**

**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

FILED MAY 7, 1925

(31,128)

(31,128)

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No. 422

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[fol. 1] **IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA, Complainant,
against

JAMES DUIGNAN, Also Known as JAMES DEGNAN; CLAUDE COMPANY,
and PALL MALL REALTY CORPORATION, Defendants

STATEMENT OF CASE

This action was begun by filing of the bill of complaint and service of the subpoena on the defendant Duignan on November 5, 1923.

Issue was joined by service of answer of James Duignan on the 16th day of December, 1923; and service of the answer of the Pall Mall Realty Corporation on or about the 2nd day of January, 1924.

There has been no change of parties or attorneys.

[fol. 2] **IN UNITED STATES DISTRICT COURT**

[Title omitted]

NOTICE OF APPEAL—Apr. 7, 1924

The above-named defendant, James Duignan, conceiving himself aggrieved by the order entered on March 28th, 1924, in the above-entitled proceeding, does hereby appeal from said order to the United States Circuit Court of Appeals for the Second Circuit; and he prays that this, his appeal, may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

O'Connor & Donnellan, Attorneys for Defendant-Appellant,
James Duignan, 38 Park Row, New York City.

And now, to wit, on April 7th, 1924, it is ordered that the appeal be allowed as prayed for.

Henry Wade Rogers, Circuit Judge.

Present: Hon. John C. Knox, U. S. District Judge.

[Title omitted]

FINAL DECREE—March 28, 1924

This cause having come on to be heard,

Now, on motion of William Hayward, United States Attorney for the Southern District of New York, solicitor for complainant, it is

Ordered, Adjudged and Decreed that the saloon and hotel located in the building known as \pm 655 and 657 Eighth Avenue, Borough of Manhattan, City of New York, and in the Southern District of New York, together with all entrances and exits thereto and therefrom, was, at the time of filing the complaint herein, a common nuisance; and it is

Further Ordered, Adjudged and Decreed that an injunction be issued forthwith under the seal of this Court enjoining the defendant James Duignan (Degnan), Claude Compani, and Pall Mall [fol. 4] Realty Corporation, their servants, agents, subordinates, employees and each and every one of them as well as their successors in interest, their heirs, assigns and representatives and all to whom notice of this decree or of the injunction hereby directed to issue shall come from manufacturing, selling, bartering, keeping or storing in said premises or any part thereof, any liquor containing one-half of one per cent or more of alcohol by volume; and it is

Further Ordered, Adjudged and Decreed that the said saloon and hotel located as aforesaid, be not occupied or used for six months from the date hereof and subject to such instructions as may be given by the United States Attorney for the Southern District of New York, the United States Marshal for the Southern District of New York is directed forthwith to lock and seal all of the entrances and exits to and from the said saloon and hotel and to prevent for the period of six months from the date hereof, the occupation or use of the said premises for any purpose whatsoever; and it is

Further Ordered, Adjudged and Decreed that the United States Marshal for the Southern District of New York shall post in a conspicuous part of the aforesaid premises a copy of this decree or of the substance thereof; and it is

Further Ordered, Adjudged and Decreed that the United States of America, complainant herein, recover of the defendants James Duignan (Degnan), Claude Compani and Pall Mall Realty Corporation its costs to be taxed and that execution issue therefor.

And the defendant Pall Mall Realty Corporation, having duly filed and served its answer to the complaint herein and its cross-bill praying that a decree be made and entered herein cancelling the lease now held by the defendant James Duignan, of the said premises and [fol. 5] declaring the same to be forfeited pursuant to Section 23, Title 2 of the National Prohibition Act and directing that the said defendant James Duignan be ousted from said premises and that the

said premises be repossessed by the said defendant Pall Mall Realty Corporation as owner thereof.

And the issues raised by said answer and cross-bill having duly come on to be heard and having been heard

Now, on Motion of Leslie & Alden, solicitors for the defendant Pall Mall Realty Corporation, it is

Further Ordered, Adjudged and Decreed that the lease of said premises, dated April 20, 1916, and the supplemental lease thereof, dated July 27th, 1916, whereunder the said defendant, James Duignan, also known as James Degnan, was in occupancy and possession of said premises for the term ending April 30, 1936, be and the same hereby are forfeited by the said defendant James Duignan, to the defendant Pall Mall Realty Corporation, the owner of the fee of said premises, and that said lease and supplemental lease from the date of the going into effect of this decree by service thereof upon the attorneys for the said defendant, James Duignan, be and the same hereby are forfeited and cancelled; and it is

Further Ordered, Adjudged and Decreed that within five (5) days from the service of this order, judgment and decree upon the attorneys for said defendant James Duignan the said defendant James Duignan vacate, surrender and deliver possession of said premises to the owner in fee thereof, the defendant Pall Mall Realty Corporation; that in default of such removal a writ of assistance issue forth-with out of this court, by the clerk thereof, directed to the United States Marshal for the Southern District of New York to remove the said James Duignan from the premises and deliver possession thereof [fol. 6] to the owner in fee thereof, Pall Mall Realty Corporation.

Upon Good Cause Shown by any party hereto application may be made for modification of this decree and for such purpose jurisdiction of this cause is retained.

Jno. C. Knox, U. S. D. J.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

[Title omitted]

AMENDED ASSIGNMENT OF ERROR

Defendant, James Duignan, having appealed from the decree of this Court, to the Circuit Court of Appeals, for the Second Circuit, files the following amended assignment of errors, upon which he will rely:

[fol. 7] 1. The Court erred in denying this defendant's motion for a jury trial of this action.

2. The Court erred in denying the motion of this defendant at the close of the complainant's case to dismiss the complaint on the ground that the testimony failed to show this defendant maintained a nuisance within the meaning of the statute.

3. The Court erred in permitting the defendant landlord to submit evidence in this action to sustain its cross bill set up in its answer.

4. The Court erred in sustaining the cause of action set up in the landlord-defendant's answer because the National Prohibition Act does not provide such action by way of cross action in an equity action brought under Section 22 of that Act.

5. The Court erred in granting judgment in favor of the defendant landlord cancelling this defendant-appellant's lease.

6. The Court erred in denying the motions made at the close of the whole case on behalf of this defendant, to dismiss both defendant's cross bill and the bill of complaint.

7. The Court erred in granting judgment in favor of the defendant landlord cancelling lease of the defendant Duignan.

8. The Court erred in entering the decree against this defendant-appellant and the premises, in that the evidence clearly indicated that any nuisance that might have been found to have existed on the testimony of the complainant, was terminated before the institution of the action.

Wherefore, this defendant prays that the judgment of this court be reversed.

O'Connor & Donnellan, Attorneys for Defendant-Appellant,
38 Park Row, New York City.

[fol. 8] CITATION—In usual form; omitted in printing

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT

To the Honorables the Judges of the District Court of the United States for the Southern District of New York, sitting in equity:

The complainant, the United States of America, brings this, its bill of complaint, against the above-named defendants and respectfully shows unto this Honorable Court as follows:

1. The complainant, the United States of America, is a corporation sovereign, and this suit is prosecuted in its name and on its behalf by William Hayward, United States Attorney for the Southern District of New York, pursuant to authority thereto granted by Section 22, Title II of the Act of Congress of October 28, 1919, known as the "National Prohibition Act," and for the purpose of en-

joining and abating a certain public and common nuisance as defined in Section 21, Title II of said Act of Congress, as now existing upon certain premises situate within the State and Southern District of New York, more particularly described in that paragraph of this bill marked and numbered "III."

[fol. 10] II. This is a suit of a civil nature arising under the Constitution and laws of the United States, and jurisdiction thereof is given to this Honorable Court by Section 22, of Title II, of said Act of Congress, and by Section 21 of the Judicial Code of the United States.

III. The complainant is informed and verily believes and therefore alleges on information and belief that the following is a description of the premises (hereinafter referred to as "said premises") upon which said public and common nuisance exists:

A certain saloon located on the ground floor and in the basement of the building situated at No. 655 and 657 Eighth Avenue, Borough of Manhattan, City, County and State of New York, Southern District of New York, together with all entrances and exits thereto and therefrom.

IV. The complainant is informed and verily believes and therefore alleges on information and belief that the defendants, James Duignan, also known as James Degnan, and Claude Compagn, are the owners and proprietors of the business conducted on said premises.

V. The complainant is informed and verily believes and therefore alleges on information and belief that said premises are now used and maintained as a place where intoxicating liquor as defined by Section 1 of Title II of said "National Prohibition Act," are habitually, continually and recurrently sold and kept for sale for beverage purposes in violation of the provisions of said Title by the defendants above-named.

VI. The complainant is informed and verily believes and therefore alleges on information and belief that unless restrained and forbidden by the injunction of this Honorable Court, the said defendant will continue in the future to keep, maintain, and use said premises, and assist in maintaining and using the same as a place where intoxicating liquor is manufactured, sold, kept or bartered, in violation of Title II of said "National Prohibition Act," and as a common and public nuisance as defined in Section 21 of said Title.

VII. For as much, therefore, as your complainant has no remedy in the premises, except in a Court of Equity, and to the end that it may obtain from this Honorable Court the relief to which it is entitled by right and equity, and pursuant to the provisions of Section 22 of Title II of said "National Prohibition Act," it respectfully prays that the above-named defendants be directed, full, true and perfect answer to make to this bill of complaint, but not under oath, answer under oath being hereby expressly waived, and that

the said defendants, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from using, maintaining, and assisting in using and maintaining said premises as a place where intoxicating liquor is manufactured, sold, kept or bartered, in violation of Title II of said National Prohibition Act."

The complainant further prays that this Honorable Court shall issue its process directed to the United States Marshal for the Southern District of New York, commanding him forthwith summarily to abate said public and common nuisance now existing upon said premises and for that purpose to take possession of said premises and to close the same and to take possession of all liquor, fixtures, and other property now used on said premises in connection with the violation constituting said nuisance, and to remove the same to a place of safe keeping to abide the further order of this Court.

The complainant further prays that this Honorable Court shall [fol. 12] enter a decree directing that all the intoxicating liquor now on said premises shall be destroyed, or, upon the application of the United States Attorney, shall be delivered to such department or agency of the United States Government as he shall designate, for medical, mechanical, or scientific uses, or that the same shall be sold at private sale for such purposes to any person having a permit to purchase liquor, and that the proceeds thereof be covered into the Treasury of the United States as provided in Section 27 of Title II of said "National Prohibition Act."

The complainant further prays that this Honorable Court shall enter a decree directing that no intoxicating liquor as defined in Title II of said "National Prohibition Act," shall be manufactured, sold, bartered, or stored in said premises, or any part thereof, and that said premises shall not be occupied or used for one year after the date of said decree, and in the event that it appears that the owner of said premises had knowledge or reason to believe that the same were occupied or used in violation of the provisions of Section 21, of Title II of said "National Prohibition Act," and suffered the same to be so occupied or used, that this Honorable Court shall enter a decree impressing a lien upon said premises, and directing that the same be sold to pay all costs and fines that may be assessed or imposed against the person or persons found guilty of maintaining such nuisance.

Wherefore, the complainant prays that a writ of subpoena issue herein directed to the above-named defendants commanding them on a day certain to appear and answer this bill of complaint.

United States of America, Complainant, by William Hayward, United States Attorney for the Southern District of New York. William Hayward, United States Attorney for the Southern District of New York, Solicitor for Complainant.

[fol. 13] Sworn to by Francis A. McGurk. Jurat omitted in printing.

[fol. 14]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AMENDING BILL OF COMPLAINT - Oct. 23, 1923

Upon reading and filing the annexed affidavit of Francis A. McGurk, Assistant United States Attorney for the Southern District of New York, verified the 23 day of October, 1923, it is

Ordered, that the bill of complaint in this action be, and the same hereby is, amended so as to include therein, as a party defendant Pall Mall Realty Corporation and so as to include therein the following allegation as paragraph IV-A of the Bill of Complaint:

"V-A. Complainant is informed and verily believes and therefore alleges upon information and belief that Pall Mall Realty Corporation, a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal office [fol. 15] and place of business at 2623 8th Avenue, Borough of Manhattan, City of New York, in the Southern District of New York, is the owner of the premises hereinabove described."

and it is further

Ordered, that the Clerk of this Court issue out of and under the Seal of this Court, in the action, a Subpoena addressed to said new party defendant.

L. Hand, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF FRANCIS A. MCGURK

COUNTY OF NEW YORK,

Southern District of New York, ss:

Francis A. McGurk, being duly sworn, says: That he is an Assistant to the United States Attorney for the Southern District of New York and has charge of this action, which is brought under Section [fol. 16] 22 of Title II of the National Prohibition Act to abate a nuisance. That process has not yet been served in this action.

That the action was commenced against the proprietor only of the establishment alleged to be a nuisance carried on upon the premises. Deponent now desires to include the said owner Pall Mall Realty Corporation as a party defendant and to amend the bill of complaint so that the caption thereof will include said owner as a defendant, and also to include an allegation in the said bill of complaint, to be known as paragraph IV-A thereof, as follows:

"IV-A. Complainant is informed and believes and therefore alleges upon information and belief that Pall Mall Realty Corpora-

tion, a corporation organized and existing under and by virtue of the laws of the State of New York, and has its principal office and place of business at #623 8th Avenue, Borough of Manhattan, City of New York, in the Southern District of New York, is the owner of the premises hereinabove described."

and also to have a subpoena issued out of and under the seal of this court, in this action, for said Pall Mall Realty Corporation.

Wherefore, deponent prays that an order be entered herein making said Pall Mall Realty Corporation a party defendant to this suit, incorporating in and making part of the bill of complaint herein the allegation aforesaid relating to the said defendant, and directing the clerk of this court to issue a subpoena in this suit addressed to said party defendant.

Francis A. McGurk.

Sworn to before me this 23 day of October, 1923. Armand Chankalian, Notary Public. New York County Clerk's No. 529. New York County Register's No. 5021. My commission expires Mar. 30, 1925.

[fol. 17]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT JAMES DEGNAN

Defendant, James Degnan, appearing by his solicitors, O'Connor & Donnellan, for his answer to the bill of complaint:

First. Denies so much of that section of the bill of complaint designated as "III," as alleges that a public and common nuisance exists on the ground floor and basement of premises, Nos. 655-657 Eighth Avenue, Borough of Manhattan, City of New York.

Second. Denies so much of that section of the bill of complaint designated as "IV," as alleges that Claude Campani is the owner or proprietor of the business conducted on said premises therein referred to.

Third. Upon information and belief denies each and every allegation contained in those sections of the bill of complaint designated as "V" and "VI."

Wherefore, defendant, James Degnan, demands judgment dismissing the bill of complaint, and denying each and every item of relief prayed for by the complainant, and awarding to him the costs of this action.

O'Connor & Donnellan, Solicitors for Defendant, Degnan.

Office & P. O. Address, 38 Park Row, Borough of Manhattan, City of New York.

[fol. 18]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT PALL MALL REALTY CORPORATION

The defendant, Pall Mall Realty Corporation, answering the complaint of the complainant by its solicitors, Leslie & Alden, respectfully alleges:

First, Said defendant admits the allegations contained in paragraph III, in said Bill of Complaint except that it denies that the public and common nuisance therein mentioned exists or has at any time existed with the knowledge, consent and acquiescence of this defendant.

Second, It admits the allegations contained in paragraph numbered IV of said complaint except that it denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained therein that Claude Compagni is one of the owners and proprietors of the business conducted on said premises.

Third, Defendant admits the allegations contained in paragraphs numbered V and VI of the complaint except that it denies the allegations contained in said paragraphs in so far as they relate to this defendant.

Fourth, Further answering, said defendant denies that it suffered the said premises to be occupied or used in violation of the provisions of Section 21 of Title 2 of the "National Prohibition Act" and that said premises were so occupied with its knowledge, consent or acquiescence.

For a separate defense and answering the said bill of complaint.

Fifth, This defendant alleges that on or about the 20th day of April, 1916, by a written indenture of lease, dated on that day, to which indenture of lease this defendant begs leave to refer upon the trial with the same force and effect as though the same were alleged and set out in full in this answer, one Heyman Vogel as landlord demised and leased to the defendant, James Duignan, also known as James Degnan, the building and premises designated as Nos. 655-657 Eighth Avenue, in the Borough of Manhattan, City, County and State of New York, Southern District of New York and situated on the southwesterly corner of 42nd Street and said Eighth Avenue in said borough, which building and premises so leased included the premises mentioned and described in the bill of complaint, for a term of nineteen years and eleven months from the first day of June, 1916, to the 30th day of April, 1936.

Sixth, That upon the making, execution and delivery of said indenture of lease as aforesaid the defendant James Duignan, also known as James Degnan, entered into occupation and possession of

said premises as such tenant and he has ever since been and still is in possession and occupation thereof as such tenant, and as such [fol. 20] tenant has been at all times thereafter and now is in full control thereof.

Seventh. That on or about the 5th day of May, 1921, this defendant became seized and possessed of said premises described in said lease and the owner thereof by a deed of conveyance thereof, which deed conveyed to this defendant the fee title of said premises subject to said lease and to the occupancy, possession and control thereof by the defendant, James Duignan, also known as James Degnan, as tenant thereunder.

Eighth. That this defendant on being informed and apprised that intoxicating liquors were being sold and kept for sale within the demised premises in violation of Title 2 of the National Prohibition Act, duly notified the tenant, the defendant, James Duignan, also known as James Degnan, of its election to cancel and terminate said lease and did so cancel and terminate said lease pursuant to such notice, but that the said defendant, James Duignan, also known as James Degnan, without the consent of the landlord has continued to and does now occupy the aforesaid premises unlawfully and has successfully defeated and obstructed all attempts and efforts on the part of this defendant as landlord to oust said James Duignan, also known as James Degnan from said demised premises.

By way of cross-bill and for affirmative relief against James Duignan, also known as James Degnan, and Claude Compani, the defendant, Pall Mall Realty Corporation, alleges:

Ninth. That on or about the 20th day of April, 1916, by a written [fol. 21] indenture of lease, dated on that day, to which indenture of lease this defendant begs leave to refer upon the trial with the same force and effect as though the same were alleged and set out in full in this answer, one Heyman Vogel, as landlord demised and leased to the defendant, James Duignan, also known as James Degnan, the building and premises designated as Nos. 655-657 Eighth Avenue, in the Borough of Manhattan, City, County and State of New York, Southern District of New York and situated on the south-westerly corner of 42nd Street and said Eighth Avenue in said borough, which building and premises so leased included the premises mentioned and described in the bill of complaint, for a term of nineteen years and eleven months from the first day of June, 1916, to the 30th day of April, 1936.

Tenth. That upon the making, execution and delivery of said indenture of lease as aforesaid the defendant James Duignan, also known as James Degnan, entered into occupation and possession of said demised premises as such tenant and he has ever since been and still is in possession and occupation thereof as such tenant, and as such tenant has been at all times thereafter and now is in full control thereof.

Eleventh. That on or about the 5th day of May, 1921, this defendant became seized and possessed of said demised premises described in said lease and the owner thereof by a deed of conveyance thereof, which deed conveyed to this defendant the fee title of said premises subject to the said lease and to the occupancy, possession and control thereof by the defendant James Duignan, also known as James Degnan, as tenant thereunder.

Twelfth. Upon information and belief, that contrary to the provisions of Title II of the Act of Congress of October 28th, 1919, known as the National Prohibition Act, the defendants James Duignan, also known as James Degnan, and Claude Compani, have without the consent of this defendant been and are maintaining, using and conducting the demised premises as a place where intoxicating liquor as defined by Section 1 of Title II of the said National Prohibition Act are habitually, continuously and recurrently sold and kept for sale for beverage purposes.

Thirteenth. That heretofore and on or about the 3rd day of January, 1923, a decree was duly entered in this court adjudging the demised premises so occupied by James Duignan, also known as James Degnan, to have been a common nuisance as defined in Section 21 of Title 2 of the National Prohibition Act on the 16th, 17th, 18th and 24th days of February, 1922, and upon the 1st and 2nd days of March, 1922.

Fourteenth. Upon information and belief, said defendants, James Duignan, also known as James Degnan and Claude Compani, have since the times mentioned in paragraph Thirteenth continued and will continue in the future to keep, maintain, use and assist in the maintaining and using of the demised premises as a place where intoxicating liquor is sold and kept for sale for beverage purposes in violation of Title II of the National Prohibition Act as a common and public nuisance as defined in Section 21 of the National Prohibition Act.

Wherefore, defendant Pall Mall Realty Corporation prays this Honorable Court that the complaint be dismissed as to it and that it give affirmative judgment upon its Cross-Bill adjudging that the defendant James Duignan, also known as James Degnan, and Claude Compani, their agents, servants, employees, assignees and sub-lessees [fol. 23] have violated Title II of the National Prohibition Act and that a decree be entered cancelling the lease now held by the said defendant James Duignan, also known as James Degnan, and declaring the same to be forfeited pursuant to Sec. 23 of Title II of the National Prohibition Act and directing that the said defendants James Duignan, also known as James Degnan, and Claude Compani, be ousted from said demised premises and that the said demised premises be repossessed by defendant Pall Mall Realty Corporation, and for

such other and further relief as to this court may seem just and proper.

Leslie & Alden, Solicitors for Pall Mall Realty Corporation.

Office & P. O. Address, 2 Rector Street, Borough of Manhattan, New York, N. Y.

Duly sworn to by Lawrence S. Ballagnino. Jurat omitted in printing.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR JURY TRIAL—Jan. 23, 1924

SIR: Please Take Notice that, upon the annexed affidavit of James Duignan, duly verified the 22nd day of January, 1924, and upon all the proceedings heretofore had, the undersigned will move this Court at a Term thereof, held for motions, on the 29th day of January, 1924, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order, framing for trial by jury the issues in this action as to the occurrence of the alleged violations of the National Prohibition Act, and directing the trial of such issues by jury; and for such other and further relief as to the court may seem just and proper.

Yours, etc., O'Connor & Donnellan, Attorneys for Defendants, 38 Park Row, New York City.

To William Hayward, Esq., U. S. Attorney for the Southern District of New York; Messrs. Leslie & Alden, Attorneys for Pall Mall Realty Corporation, Defendant-Landlord.

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JAMES DUGNAN

STATE OF NEW YORK.

County of New York, ss:

James Duignan, being duly sworn, says:

That he is the defendant of that name in this action.

That this is an action brought under Section 22, of the National Prohibition Act, for an injunction preventing the continuance of business on the ground floor and basement of premises 655 and 657 Eighth Avenue, Borough of Manhattan, City of New York, on the

ground that the provisions of the Volstead Act have been violated at that place.

Your deponent is tenant of the above premises under a lease dated April 20, 1916, made between him as tenant and one Hyman Vogel, as landlord at the rent of Fourteen thousand six hundred dollars a year. Subsequently, title of the above premises was transferred to the Pall Mall Realty Corporation, the present landlord. The rental [fol. 26] value of the premises is at present much greater than the rent provided by the lease and the landlord, actuated by greed, has harrassed the tenant during the past three years in a vain effort to dispossess him from his holding. The market value of the lease held by your deponent is Two hundred fifty thousand dollars as appears from the affidavit of a competent appraiser annexed hereto. The rental values in the neighborhood have all increased and your deponent's lease covers one of the most important corners in New York City. This case for him is not a matter of hundreds of dollars, but of many thousands. In fact, it means the confiscation of your deponent's entire private fortune if he be deprived of this lease by an adjudication in this action.

That your deponent has invested sixty-two thousand five hundred dollars, in this property and business venture, the entire fruit of a long life of industry and this entire investment is jeopardized by this action; and the effect of the action is really to confiscate property and the adjudication involves nothing else than property rights.

A proceeding to dispossess him was brought in the Municipal Court of the city of New York, Borough of Manhattan, Third District. This proceeding was started in May, 1922, and has not yet been tried, but has been continuously adjourned and is at present on the reserved calendar of that court. The petition upon which this proceeding was instituted, alleged violations of the National Prohibition Act and upon order, the landlord rendered to the tenant, a bill of particulars of his claim, stating that on May 27, 1920, one Michael Smith violated the law; on March 31, 1921, Simon Pigasci; on February 15, 16, 18 and 24 and March 1, 7 and 24, 1922, one Claude Campani; and on April 24, 1922, persons unknown.

[fol 27] That, upon information and belief, every one of the alleged violations claimed to have occurred during the months of February, March and April, 1922, are claims made by private detectives employed by the landlord and whose business it was to bring about, if possible, violations of the Volstead Act at the above premises. That the lack of credibility in the tales of private detectives employed for a specific purpose, is a notorious fact in the practice of law and the fact that it is their business and that they are paid for claiming to have witnessed violations of a statute, tends to make their claims incredible.

That, on or about the 27th of May, 1920, one Michael Smith was arrested and subsequently arraigned in this Court, on a charge of having sold intoxicating liquor; and pleaded guilty to that charge; and that on or about the 31st of May, 1921, one Simon Pigasci was arrested charged with having sold intoxicating liquor in the premises involved here; and subsequently pleaded guilty to the crime charged

in this court. That neither of these individuals violated the law with the knowledge, consent, procurement or connivance of your deponent and evidence to that effect will be presented by the tenant upon the trial of this action.

That all the other violations of the law, which anyone has ever claimed to have witnessed or partaken in, at the above premises, is the allegation of an interested party and of private detectives employed by the landlord; and your deponent denies each and every one of them and has sufficient testimony to combat such claims in court.

That although the landlord refused and neglected to bring to trial the dispossession proceeding instituted by him two years ago in the proper forum, in the Municipal Court of the City of New York, he did, immediately upon the commencement of this action, file an [fol. 28] answer which contains a cross-bill asking that the tenant, your deponent, be dispossessed and in this cross-bill, states exactly the claim heretofore made by him in the action still pending in the Municipal Court of the City of New York. That this, if nothing else, would show the animus of the landlord.

That this case therefore, resolves itself to this. First, it is an action which, though provided by a statute and already held to be constitutional, certainly violates the spirit of the Constitution, however closely it may meet its letter, in that it is tantamount to an action for forfeiture and confiscation of property without trial by jury. The worst phase of it, however, is that the majesty of the United States is lost and the Government becomes a mean tool utilized by a greedy landlord to attain his private end.

That, in the premises, therefore, your deponent believes there is ample ground for this court to direct a trial of the issue as to your deponent's guilt or the actual occurrence of any crimes upon the premises, by jury; and therefore asks for an order framing the issues made by the pleadings, as to whether or not the provisions of the Volstead Act were violated in any respect upon the premises; and, secondly, if such violations occurred, whether or not responsibility therefor, may be attached to your deponent.

That this request is made because your deponent believes that a jury of twelve men can be of assistance in advising the court as to the credibility of the witnesses, who will be numerous upon this trial. That, despite its form under the statute, it is not the usual equity case, which ordinarily involves only matters of law. That, as a matter of fact, there is little law involved and all the questions are questions of fact, which should properly be decided, as are all questions of fact, by a jury trial.

[fol. 29] That, further, the charges made against your deponent are of a criminal nature, other than contempt, and therefore are essentially charges to which your deponent is entitled to vindication by a jury.

That no previous application has been made for this order; and an order to show cause is asked for the reason that it has but now been brought to your deponent's attention, that this action is on the

calendar to be marked ready for trial, on January 29th, 1924; and sufficient time will not elapse to give the usual note of motion.

Wherefore, your deponent asks for an order to show cause, directed to the landlord and the United States Attorney, the parties to this action, requiring them to show cause why an order should not be made, directing the framing of the issues in this case for trial by jury, and that such trial by jury be had.

James Duignan.

Sworn to before me this 22nd day of January, 1924. Mildred Edelstein, Notary Public, New York County, N. Y. Co. Clk's No. 150. Reg. No. 4007A. Commission expires March 30, 1924.

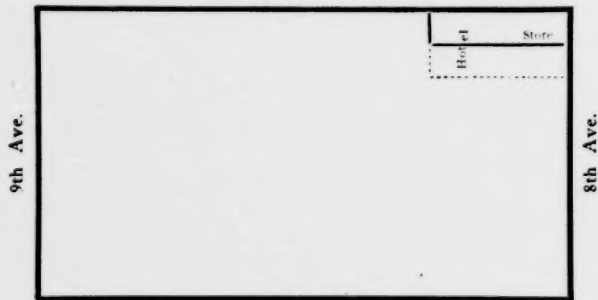
[fol. 30] EXHIBIT TO AFFIDAVIT OF JAMES DUGNAN

Sidney L. Warsawer, Real Estate, 239 West 42nd Street, New York

January 22nd, 1924.

Mr. James Dugnan, #657 Eighth Avenue, New York City.

West 40th St.



West 41st St.

DEAR SIR: We have given careful consideration to your request of our opinion of the value of the leasehold which has 12 and $\frac{1}{4}$ years to run on the property known as Nos. 655-657 Eighth Avenue, being the southwest corner of Eighth Avenue and 42nd Street, the dimensions being as follows:

Store and basement, approximately 25' x 53' Upper part consisting of a three story hotel, each floor being approximately 50' x 53'.

Our estimate of the value of this lease at the present time, is Two Hundred Fifty Thousand (\$250,000) Dollars.

Yours very truly, Sidney L. Warsawer.

SLW:EK.

[Title omitted]

AFFIDAVIT OF LAWRENCE S. BOLOGNINO

STATE OF NEW YORK,

County of New York, ss:

LAWRENCE S. BOLOGNINO, being duly sworn, deposes and says:

I am the Vice President of the Pall Mall Realty Corporation, one of the defendants in the above entitled action.

The Pall Mall Realty Corporation purchased and became the owner of the premises involved in this action, Nos. 655-657 Eighth Avenue, in the Borough of Manhattan, City and County of New York, on the 5th day of May, 1921, and at the time the Corporation acquired title thereto the defendant in this action, James Duignan, also known as James Degnan, was occupying and using the premises as a hotel and saloon under a lease thereof previously executed between him as tenant and one Hyman Vogal as landlord. The Pall [fol. 32] Mall Realty Corporation necessarily acquired title to the premises subject to the aforesaid lease and is not responsible for the tenancy created thereby.

The lease to which the defendant Pall Mall Realty Corporation begs leave to refer upon this motion with the same force and effect as though attached hereto and made a part hereof, limits the tenant to the occupation and use of the leased premises for a liquor saloon and hotel only. It does not permit the leased premises to be occupied or used by the tenant for any other purpose whatsoever.

As I am informed and verily believe, prior to the adoption of the Eighteenth Amendment to the United States Constitution and prior to the passage of the Wartime Prohibition Act, the principal and practically the only business conducted in the leased premises by the tenant Duignan was the sale of intoxicating liquors in the barroom and other parts of said premises, the hotel business being a minor element and substantially a side issue to the saloon. In other words, in the days before prohibition the place was run as a typical corner saloon, the premises not being in a section of the City of New York where hotels are located, or where, as I am informed and verily believe, a hotel could be made profitable without the attendant sale of intoxicating liquor therein.

I am further informed, and verily believe, that since the passage of the Federal Wartime Prohibition Act and its successor, the National Prohibition Act, the situation as to the use of the leased premises has been and now is substantially unchanged, very few of the hotel rooms being rented and there being very few bona fide hotel guests, certainly not enough to derive an income from the same sufficient to make the leased premises profitable as a hotel; so that if the lease has any pecuniary value at all to the tenant Duignan it [fol. 33] must be by some income derived by him from the leased premises outside of their use as a hotel, and as the lease prohibits the

use of the leased premises for any purpose other than a hotel and saloon, such profitable income, if derived at all from the leased premises, must be derived through the sale of intoxicating liquors therein, which sale is illegal under the National Prohibition Act.

For the reasons aforesaid your deponent denies that the lease in question has any pecuniary value to the tenant except through the use of the leased premises for illegal and unlawful purposes and in violation of the Constitution of the United States of America and of the National Prohibition Act.

I am further informed and verily believe that from the time the defendant Duignan entered into possession of the leased premises as tenant and down to the present time, the defendant Duignan has personally conducted the business carried on in said premises and that such business has not been conducted by agents or representatives of the said tenant, so that the defendant Duignan has been at all times familiar with what has been done upon and in the leased premises. I am further informed and verily believe that the defendant Duignan is personally at the premises substantially every day and at all times during the day and evening except when absent therefrom for short spaces of time, as any man would be who is personally conducting and himself running a hotel and saloon business.

It appears from the court records of this court that the defendant Duignan has been a continuous and contumacious violator of the Prohibition Laws of the United States of America since their inception.

He admits by his affidavit upon which this motion is based that on May 27th, 1920, one Michael Smith was convicted of selling intoxicating liquors in the leased premises, and that on May 31st, 1921, [fol. 34] Simon Pagasei was also convicted of the same offense. While it is true the defendant Duignan alleges that these offenses were committed without his knowledge, consent, procurement or connivance, yet as I am informed and believe, they were committed by his employees, and this allegation in his moving affidavit should be considered by this Honorable Court in connection with the fact that the defendant Duignan was personally running the business himself at the time the crimes were committed, and it seems hardly probable that intoxicating liquors could be kept in the leased premises ready for sale without his knowledge and consent. At any rate the crimes were committed in the premises leased by him and their commission shows a culpable negligence on his part in permitting his employees or others to have in the premises and to sell intoxicating liquors in violation of the Prohibition Laws. It is apparent that the first violation and conviction was not sufficient to cause the defendant Duignan to take steps as a law abiding citizen to see that the premises leased and run by him were thereafter conducted in a proper manner, for although the first crime was committed in the leased premises in 1920, his negligence and improper supervision of the business conducted in said premises enabled a second crime of the same nature to be committed therein one year thereafter or in May, 1921.

Nor did the sale of liquor in the leased premises cease with these two convictions.

In April, 1922, an action was instituted in this court by the United States of America against James Duignan, otherwise known as James Degnan, and one Claude Capponi, alleging numerous violations of the National Prohibition Act in the leased premises. In such action the defendants mentioned appeared by George L. Donnellan, Esq., [fol. 35] an attorney, whose firm now also represents the defendants Duignan and Capponi.

The defendant Duignan apparently realizing that there was no defense which he could successfully interpose to the allegations of the illegal sales of intoxicating liquors in the leased premises alleged in the bill of complaint in the action last mentioned, did not interpose any answer to such bill of complaint, and on June 23, 1922, an order was duly made and entered therein by this Honorable Court, ordering that the bill of complaint be taken pro confesso as to said defendants Duignan and Capponi. Thereafter and on January 3rd, 1923, it appearing that the defendants' time to answer had expired and they having failed to file an answer to the bill of complaint herein, a final judgment was awarded to the complainant, the United States of America, against the defendants Duignan and Capponi, by which it was ordered, adjudged and decreed that a "certain hotel known as Duignan's Hotel situated in the building located at 655 and 657 Eighth Avenue, Borough of Manhattan, City and County of New York, in the Southern District of New York, was on February 15th, 16th, 17th, 18th and 24th, March 1st and 7th a common nuisance." The last mentioned judgment also contained an injunction enjoining the defendants Duignan and Capponi from "manufacturing, selling, bartering or storing in said premises or any part thereof any liquor containing one-half of one per cent or more of alcohol by volume."

It thus appears by the records of this court that intoxicating liquors had been sold in the leased premises in violation of law in 1920 and 1921, and in 1922 that the sale was either made by defendant Duignan himself or by an employee for whose acts he was responsible, for the judgment entered in the former United [fol. 36] States action without opposition by the defendant Duignan is an admission by him of the truth of the allegations in the bill of complaint herein and in the judgment that liquor was illegally sold in the leased premises almost continuously during the months of February and March in that year.

It now appears that notwithstanding the injunction issued against him by the United States District Court in the former action, the defendant Duignan has continued in his contumacious disregard of the law and of the injunction of this court, and in his wilful and illegal sales of intoxicating liquors in the leased premises, and the United States of America has instituted the present action against him for subsequent illegal sales of liquor.

In the present action the defendant Pall Mall Realty Corporation has been joined as a defendant by reason of its being the owner

of the premises in which the tenant Duignan has illegally sold intoxicating liquors.

The defendant Pall Mall Realty Corporation has no control whatsoever of the leased premises, their operation and control being solely and exclusively in the hands of the tenant Duignan under the terms of the lease. Pall Mall Realty Corporation has nothing whatsoever to do with the business conducted in the leased premises; the tenant Duignan was occupying the premises as tenant under such lease at the time the Pall Mall Realty Corporation obtained title thereto, and for this lease and tenancy the Pall Mall Realty Corporation is in no way responsible, as it was obliged to take its title subject to the existing lease.

As to the allegations in the affidavit of the defendant Duignan, upon which this motion is based, that he had invested \$62,500 in this property, I have no information whatsoever as to the actual amount expended by him, but I am informed and verily believe [fol. 37] that whatever investment the defendant Duignan placed in the leased premises was in the fitting up of an elaborate barroom and saloon for the sale of intoxicating liquor before the passage of the Eighteenth Amendment of the United States Constitution and the passage of the Prohibition Laws, and if this investment has become valueless under prohibition, that fact has nothing to do with this litigation.

The Pall Mall Realty Corporation is desirous of terminating the aforesaid tenancy and ridding its premises of a tenant who persists in violating the Prohibition Laws. In interposing its answer and cross bill in the present action asking for a cancellation of the lease, the Pall Mall Realty Corporation is actuated by no other reason than a desire to oust a tenant whom it believes has violated the injunction of the United States Court and who flagrantly and continuously persists in his violations of the National Prohibition Act.

On first receiving notice from the Police Department of the City of New York that the tenant Duignan had violated the National Prohibition Act and the State Prohibition Act then in force known as the Mullan-Gage Law, the landlord, Pall Mall Realty Corporation, at once instituted a summary proceeding in the Municipal Court of the City of New York to dispossess the tenant on account of such violations of law.

This proceeding the landlord pressed vigorously in the Municipal Court, but has been unable to bring the same to trial, first, on account of the well known congested condition of the Municipal Courts of the City of New York, and second, because it has been impossible to obtain a jury to try the proceeding.

The tenant, Duignan, demanded a jury trial, and it is a well known fact that the jury calendars of the Municipal Court were so [fol. 38] clogged with litigations between landlords and tenants arising under the New York State Emergency Rent Laws that the trial of cases therein were very much delayed. For that reason this proceeding for a long time did not reach a position upon the calendar where it could be tried. When the proceeding finally reached such a position that it seemed possible to try it the landlord on at least

four occasions appeared in court with his witnesses ready to proceed to trial, but in each instance this particular proceeding could not be reached for trial on the day set on account of other preceding jury cases.

Upon one day when the case appeared upon the calendar the landlord together with his witnesses remained in court the greater part of the day expecting to go to trial, and was assigned to one of the parts of such court for trial, but finally an adjournment had to be taken as the case could not be disposed of upon that particular jury day.

In furtherance of its desire to dispose of the proceeding the landlord asked that it be given a preference upon the calendar of the Municipal Court for a specified jury day, and after considerable delay this request was finally granted. Upon the day fixed for trial the landlord was present with his witnesses at the opening of court and both parties announced themselves ready for trial. An attempt was then made to impanel a jury, and, to my utmost astonishment, each and every jurymen summoned to the jury box, except two, announced in open court that they had such a prejudice against the Prohibition Amendment of the United States Constitution and the Prohibition Laws that they would not render a verdict to dispossess a tenant even if they were satisfied that he had illegally sold liquor in the leased premises. The entire panel of jurors summoned for that court day was called, examined and exhausted, and, as already [fol. 39] stated, only two jurymen were found who would even state that they were unprejudiced. All the remaining jurymen of the entire panel were excused from service of this case by the court itself on the ground of their prejudice. I was further informed on that day by people around the court room of the Municipal Court where the case was pending that it would be impossible to obtain a jury to try the case. This is an astounding situation, but it is one which nevertheless exists, and when the attorneys for the landlord were satisfied that they could not at that time obtain an unprejudiced jury to try the proceeding, it was allowed to be dropped from the calendar, and upon the institution of this action in the United States Court and the joining of the Pall Mall Realty Corporation as a defendant therein, that corporation, as the moving party in the dispossess proceeding in the Municipal Court, knowing it would be impossible to obtain a trial thereof, moved to discontinue the Municipal Court proceeding, and such motion is now pending and undetermined, and if such motion should not be granted the landlord will decline to prosecute such proceeding on the ground that it is impossible to have a fair and impartial jury trial thereof.

In view of the above facts and especially in view of the records of this court showing a continuous and wilful violation of the Prohibition Laws by the defendant Duignan, it is apparent that his present motion for a jury trial of the issues involved herein is not made in good faith but for the purpose of hindering and delaying the trial of this action and if possible thwarting justice so as to enable him to continue his flagrant and contumacious violations of the Prohibition Law.

The landlord, Pall Mall Realty Corporation, desires to get this violator of the law out of its premises, and desires to stop for all time [fol. 40] violations of the Prohibition Law therein by cancelling this lease and ejecting the defendant Duignan, as tenant, therefrom. It has no other object or purpose whatsoever in interposing its cross bill in this action and asking therein, as it does, for the cancellation of the lease and the dispossessing of the tenant.

The defendant, Pall Mall Realty Corporation, therefore asks that the motion of defendants Duignan and Capponi for a jury trial be denied.

Lawrence S. Bolognino.

Subscribed and sworn to before me this 20th day of January, 1924. Lena Herbert, Notary Public, New York. New York Co. Clk's No. 547. New York Co. Register's No. 5071. Commission expires March 30, 1925. (Notary's Seal.)

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

Before Honorable John C. Knox, District Judge

Settled Case

New York, March 7th, 1924—10:30 a. m.

APPEARANCES OF COUNSEL

William Hayward, United States Attorney, solicitor for plaintiff; John Holley Clark, Jr., Assistant United States Attorney, counsel. O'Connor & Donnellan, solicitors for defendant, Duignan; George L. Donnellan, counsel.

Leslie & Alden, solicitors for defendant, Pall Mall Realty Corporation; Warren Leslie, counsel.

The Court: I will deny the motion for a jury trial.

[fol. 42] PRIMA FACIE PROOFS

PETER REAGER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Mr. Donnellan: If your Honor please, in connection with this case, I respectfully ask that all the witnesses be excluded during the trial.

Mr. Clark: This is no different from any other case.

Mr. Donnellan: It is different from other cases for certain reasons that I do not feel at liberty to state in the court room, but if you desire me to state them, I will.

Mr. Clark: As far as the Government is concerned I do not see any reason for it.

The Court: Who are the witnesses?

Mr. Donnellan: They have some private detectives. I do not care, so far as the Government agents are concerned, whether they stay or not, but I would like to have the private detectives excluded.

The Court: All right, I will exclude them.

Direct examination.

By Mr. Clark:

Q. 1. Mr. Reager, are you a Federal prohibition agent?

A. I am.

Q. 2. Do you know the premises 655-657 Eighth Avenue?

A. I do.

Q. 3. When were you in those premises and what occurred?

A. June 8th, 1923, about one-twenty P. M.

Q. 4. Did you go there alone or were you accompanied by some-
[fol. 43] one?

A. I was accompanied by another fellow.

Q. 5. His name was what?

A. I do not know his name.

Q. 6. What happened while you were in the place?

A. We walked up to the lower end of the bar. We ordered two beers. This fellow mumbled something to the bartender which I could not hear. The bartender asked me where I worked. I told him I worked for the fellow with me.

Mr. Donnellan: I object to this, if your Honor please.

Overruled; exception.

Q. 7. What did you say to the bartender?

A. The bartender asked me where I worked. I told him I worked for the fellow that was with me. He says, "I guess you are all right," and he called the other bartender by the name of Tony. Tony took us in the sitting room and went upstairs and brought down two little ounce bottles of fluid and poured them in a small one-ounce glass. The fellow with me paid him \$1.20, I think it was, and this Tony went out and rang it on the cash register.

Mr. Donnellan: I object to that.

By the Court:

Q. 8. What is your best recollection as to the price, if you have any recollection at all?

A. I think it was sixty cents apiece, if I am not mistaken, \$1.20.

By Mr. Clark:

Q. 9. Tony went out and rang it up on the cash register?

A. Yes.

[fol. 44] Q. 10. What else did you do?

A. I then followed him out. I called him back and asked for two more drinks of whiskey. He went upstairs again and he came down with two small one-ounce bottles and he gave us another drink. I then paid for it and I watched him where he went. He went to the cash register behind the bar and rang it up. I tasted both my drinks, and put it in a small bottle and brought it to the United States chemist.

Q. 11. I show you that bottle and ask you if that is the bottle you put it in?

A. Yes, sir.

Mr. Clark: I offer that in evidence. Marked Plaintiff's Exhibit No. 1.

Q. 12. Did you see the defendant Duignan there?

A. I did.

Q. 13. Where was he at the time?

A. Standing at the other end of the bar.

Q. 14. At the front end of the bar?

A. Front end.

Q. 15. You got your drinks in the back room?

A. Yes, sir.

Q. 16. Where was the cash register?

A. In back of the bar, in the front room, in the barroom.

Q. 17. At the end toward the back room, you mean?

A. No, right in the center of the barroom, in back of the bar.

Q. 18. In the center of the bar?

A. Yes, sir, in back of the bar.

Cross-examination.

By Mr. Donnellan:

X Q. 19. What date do you say this was, Mr. Reager?

A. June 8th, 1923.

X Q. 20. Do you recollect what day of the week that was?

A. No, I cannot very well.

[fol. 45] X Q. 21. You are sure it was not a Sunday?

A. No, it was a week day.

X Q. 22. What time were you there?

A. It was about one-twenty P. M.

X Q. 23. What sort of a bar is in these premises?

A. One of these real old-fashioned bars; a long bar.

X Q. 24. It runs along the wall?

A. No, I would not say it runs along the wall. It is a bar that you see in any barroom.

X Q. 25. About how long is it?

A. I do not know the measurements.

X Q. 26. You have a pretty good idea as to whether it was twenty-five feet or fifty feet, have you not?

A. No, I have not.

X Q. 27. Mr. Reager, this is a big establishment, is it not?

A. It is a big store, yes.

X Q. 28. It is located where?

A. On 42nd Street and Eighth Avenue, southwest corner.

X Q. 29. On which side of the room is the bar?

A. As you walk in, it is on the left-hand side.

X Q. 30. As you walk in from Eighth Avenue?

A. Yes.

X Q. 31. The barroom is on the southwest corner?

A. It is.

X Q. 32. And as you walk north and turn in, the bar is on the left-hand side?

A. Yes.

X Q. 33. And runs the full length of the store, does it not?

A. Pretty near.

X Q. 34. Is it fifty feet long?

A. I do not know the measurements.

X Q. 35. There is a brass rail that runs straight alone in front of it?

A. I do not know whether there is or not.

X Q. 36. You stood there, did you not?

A. I did.

X Q. 37. It is just the same sort of a bar as you see in any old-
[fol. 46] fashioned barroom, a long, straight bar?

A. Yes, sir.

X Q. 38. And there are tables behind it?

A. There are.

X Q. 39. How many men were working there?

A. Two.

X Q. 40. And there are tables in the place also around there?

A. In the rear room.

X Q. 41. And in the barroom also?

A. I did not notice any tables.

X Q. 42. Are there not tables right opposite the bar?

A. I did not notice any.

X Q. 43. Is there not a big lunch counter right opposite the bar?

A. There is.

X Q. 44. Did you not see food being served there at that lunch counter?

A. While I was in there, no.

X Q. 45. You were there just about the noon hour, were you not?

A. One-twenty. I did not see anybody getting any food served.

X Q. 46. Who was with you on this occasion?

A. Another fellow; I just cannot think of his name.

X Q. 47. Was he a prohibition man?

A. I do not know; he may have been.

X Q. 48. Where did you pick him up?

A. Down in this building.

X Q. 49. Do you know Mr. Warren Leslie, the attorney for the
Pall Mall Realty Company, that is the owner of this property?

A. I do not know who owns the property.

X Q. 50. Do you know Mr. Leslie, who sits here in court?

A. I do not.

X Q. 51. Do you know Mr. Alden, who sits behind him, his partner?

A. I do not.

[fol. 47] X Q. 52. Or this gentleman here that is associated with him (indicating)?

A. I do not.

X Q. 53. You are sure it was not one of those three men that introduced you to this man that went up with you?

A. It was not.

X Q. 54. Whereabouts in this building did you pick him up?

A. On the third floor.

X Q. 55. In the commissioner's room?

A. No.

X Q. 56. What was the occasion for this sudden acquaintance with this unknown man? How did it come about?

A. I was asked to go up with him.

X Q. 57. Who asked you?

A. Mr. Cohen.

X Q. 58. Mr. Sanford Cohen, who was then a United States District Attorney?

A. That is right.

X Q. 59. Did Mr. Cohen tell you why he wanted you to go to this particular place?

A. He did not.

X Q. 60. Did Mr. Cohen introduce you to this man?

A. I think he did.

X Q. 61. Let us have the conversation between Mr. Cohen and yourself, so far as this unknown man is concerned?

A. I do not remember no conversation between Cohen and myself.

X Q. 62. He did not simply say, "Mr. Reager, this is Mr. Smith," and walk away from you?

A. I think that is about all he did say.

X Q. 63. He just said, "This is Mr. so and so," the name you have forgotten?

A. That is about all he did say.

X Q. 64. Then, of course, you had a little conversation with this man, did you not?

A. Walking up, we were talking.

X Q. 65. What was the first thing he said to you?

A. I do not remember.

[fol. 48] Mr. Donnellan: Let us have the two detectives who are down here.

(Two men were called into the court room.)

X Q. 66. Mr. Reager, take a look at this gentleman, Mr. Westings. Was he the man you met in the hall?

A. It looks like the one; it looks like the party that I was with.

X Q. 67. Take a look at this other man, Mr. O'Connor. Was he with you that day?

A. No.

X Q. 68. So it was Mr. Westings that you met in the hall?

A. That is right.

X Q. 69. Did Mr. Westings tell you what his occupation was?

A. I do not believe I asked him.

X Q. 70. Did he not tell you he was a private detective and he was trying to get something on Duignan?

A. No, he did not.

X Q. 71. Did he not tell you that he was employed by the Pall Mall Realty Company and they were trying to get Duignan out of that corner?

A. He did not.

X Q. 72. What did he say?

A. The only thing he said was, that "If they ask you who you are working for, say you are working for me in the iron business."

X Q. 73. Did you say that?

A. When the bartender said, "Who are you working for?" I told him.

X Q. 74. Of course, that was not so? You were not?

A. You know.

X Q. 75. You did not mind telling him that story so as to induce him to sell that drink to you?

A. It was not a story. When he asked me who I was working for, I told him.

X Q. 76. So it is Mr. Cohen who introduced you to Mr. Westings?

A. That is right.

[fol. 49] X Q. 77. So far as you know, Mr. Westings does not work for the United States of America, does he?

A. He may; I do not know.

X Q. 78. You were right alongside of Westings at this bar at the time he mumbled his little conversation with the man behind the bar?

A. You could hear him mumble, but I do not just know what it was.

X Q. 79. He did not say that to Tony?

A. No.

X Q. 80. He said that to whom?

A. The other bartender.

X Q. 81. What was his name?

A. I do not know.

X Q. 82. Then he walked over to this man Tony?

A. He called for Tony.

X Q. 83. Then he mumbled something to Tony?

A. Yes.

X Q. 84. Then Tony mumbled something to Westings and you?

A. Then Tony told us to go into the back room.

X Q. 85. After all those formalities, Tony came back with two bottles of whiskey?

A. He went upstairs and came down.

X Q. 86. Did Tony tell you he lived there?

A. He did not.

X Q. 87. Did he tell you he had been living there?

A. He did not.

X Q. 88. Did he tell you he had hired rooms there on different occasions for the purpose of trying to get evidence of a liquor violation?

A. He did not.

X Q. 89. Did Westings tell you that he had been trying to get some evidence of a violation and did not succeed?

A. He never did.

X Q. 90. Mr. Reager, did Mr. Cohen tell you not to make an arrest in case you did buy liquor there?

A. I do not remember whether he did or not.

[fol. 50] X Q. 91. You did not make any arrest there?

A. I did not.

X Q. 92. You did not arrest Tony?

A. I did not.

X Q. 93. And you did not arrest the other bartender?

A. Nobody.

X Q. 94. Although the liquor had been sold direct to you at a table in the rear room?

A. That is right.

X Q. 95. During this time you say Duignan stood at the other end of the bar?

A. He was even there when I walked out.

X Q. 96. There is a partition that separates this long bar from the back room?

A. Part of a partition and it is part of the way to get through.

X Q. 97. How many drinks were served?

A. To this other fellow and myself.

X Q. 98. Yes?

A. Four altogether; two apiece.

X Q. 99. Then you paid \$2.40 instead of \$1.20, did you not?

A. No, he paid for two drinks and I paid for two drinks.

X Q. 100. And this is all that you have left of them?

A. Of two drinks, yes.

X Q. 101. Did you make an affidavit in regard to these occurrences when you came back to Mr. Cohen's office?

A. I won't say; I do not remember.

X Q. 102. You reported the result of your visit to Mr. Cohen, did you not?

A. I do not remember whether I did or not.

X Q. 103. You turned in the liquor that you claim you got from Tony?

A. Yes.

X Q. 104. You had that analyzed?

A. I turned it into a United States chemist.

X Q. 105. Did you not make an affidavit on which your search warrant was issued?

A. I did not.

X Q. 106. You do not know where Tony went when he went upstairs?

A. No.

[fol. 51] X Q. 107. You claim he went upstairs and came down with these two drinks?

A. He did.

X Q. 108. On two different occasions?

A. Yes, sir.

X Q. 109. And you remained seated at the table in the rear room all the time?

A. That is right.

X Q. 110. You paid him first \$1.20 and then another \$1.20?

A. Yes.

X Q. 111. Each time he got the \$1.20, he went out of the bar-room?

A. The second time I watched him where he went with it.

X Q. 112. Even though there is a partition between the barroom and the rear room, you could see?

A. I told him I was going to the toilet. In the meantime I just wanted to see what he was going to do with the money.

X Q. 113. The toilet was downstairs, was it not?

A. I do not just remember where the toilet was.

X Q. 114. As a matter of fact, your recollection of this case is rather hazy, is it not?

A. I would not say so. I remember following him out to see what he done with the money, and my excuse of what I was doing was to say I was going to the toilet. I do not know whether I went or not, but I know I seen him ring the money on the register.

X Q. 115. You say you did not make any affidavit?

A. To get a search warrant?

X Q. 116. Yes?

A. I did not, no.

X Q. 117. You say you did not make any affidavit as a result of your visit to the United States Attorney's office?

A. I do not know whether I did or not.

X Q. 118. What are you testifying from today, your recollection?

A. My memory.

X Q. 119. All these facts that you have testified to?

A. Everything from my memory, yes.

[fol. 52] X Q. 120. Although since June 8th, 1923, you have had quite a number of cases, have you not?

A. That is right.

X Q. 121. About how many cases would you say you have had since June 8th, 1923?

A. I have got no idea.

X Q. 122. Were you ever subpoenaed by the Pall Mall Realty Company as a witness in connection with a dispossess case involving these premises in the Third District Municipal Court?

A. No, sir.

X Q. 123. Did this man Westings tell you that the landlord was trying to get possession of this store?

A. Never did.

X Q. 124. Did you ever go down to the office of Leslie and Alden in connection with this case?

A. No, sir.

X Q. 125. Ever make any affidavits for them?

A. I did not.

X Q. 126. Or to the office of the Pall Mall Realty Company?

A. No, sir.

X Q. 127. Have you ever been near the premises since?

A. No, sir.

X Q. 128. How often have you seen this man Westings since that date?

A. Today.

X Q. 129. This is the first time you saw him?

A. Yes.

X Q. 130. Did you see him yesterday also?

A. I do not remember whether I did or not.

X Q. 131. Did you have a conversation with him today?

A. No.

X Q. 132. You did not ask him why he was here?

A. I did not know him, to be frank. He said, "Hello," to me.

X Q. 133. When he said, "Hello," did you not ask who he was?
[fol. 53] A. I did not, because there are hundreds who give me a hello.

X Q. 134. Did you search through the premises on that occasion?

A. I did not, no.

X Q. 135. After you got these two drinks you had no further conversation with this Westings at all, did you?

A. I left him on the next block.

X Q. 136. Did he say he was going back to his room in Duignan's hotel at 42nd Street?

A. He did not tell me where he was going.

X Q. 137. Does it not strike you at this late day as being strange that you did not make an arrest when you claim two drinks were delivered to you?

A. No.

X Q. 138. Is not that a rather unusual occurrence?

A. I was told just to get a drink, and that was all.

X Q. 139. That is what I am getting to. What were you told besides getting a drink?

A. That was all.

X Q. 140. Were you not told to get a drink and not make an arrest?

A. Just to get a drink there.

X Q. 141. And not make an arrest?

A. He did not say anything about making an arrest.

X Q. 142. Did you not think it was advisable to make an arrest when you were getting a drink?

A. I did not know who the man was.

X Q. 143. Were you more interested in the man who was with you than in performing your duty as a Government agent?

A. I was told by the Assistant District Attorney to go up and see if I could buy a drink of whiskey, and nothing else.

X Q. 144. Now, you have said you did know what the man with you wanted?

A. No, I did not. I said I did not know who he was.

X Q. 145. Did he say he was going to make an arrest?

A. He did not.

[fol. 54] X Q. 146. Did he keep a sample of what you got?

A. He did not.

X Q. 147. Did this agent tell you that he had known the bartender?

A. I do not remember whether he did or not.

X Q. 148. You have given everything that happened?

A. I am telling you everything that happened that day.

X Q. 149. Did this man Westings say where he was going when you left him?

A. If I am not mistaken, I think he said he was going down to Mr. Cohen's office. I am not sure.

X Q. 150. You were coming back this way yourself, were you not?

A. I did not; I went home that day.

X Q. 151. This was only one-twenty in the afternoon?

A. That is why I went home.

X Q. 152. You quit at that hour?

A. I did.

JOSEPH O'CONNOR, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination.

By Mr. Clark:

Q. 1. What is your business, Mr. O'Connor?

A. I am an investigator.

Q. 2. Employed by whom?

A. I am not employed by anyone at the present time.

Q. 3. On April or May, 1923, by whom were you employed?

A. By the office of Dominick Riley.

Q. 4. That is a private detective agency?

A. Yes, sir, it is.

Q. 5. How long have you been employed there?

A. A year and eleven months.

[fol. 55] Q. 6. Prior to that, what had you been employed at?

A. I was employed by the Surface Railway Company here in New York as an investigator.

Q. 7. For how long?

A. For about twenty years.

Q. 8. What railway is that?

A. That was the old Metropolitan system, and later the New York Railways, and then the Third Avenue system.

Q. 9. Did you resign from there?

A. I did.

Q. 10. Do you know these premises known as Duignan's Hotel & Cafe, 8th Avenue and 42nd Street, New York City?

A. Yes, sir.

Q. 11. Will you state on what occasions you were in there and what occurred on the various occasions when you were in there?

A. The first time I went there was about on April 24th.

Q. 12. 1923?

A. 1923. I went there every day and every other day up until probably about May 24th.

Q. 13. Every day for about a month?

A. Yes. I would go a few days every day, and then I would probably skip a day. I would go in and have a glass of beer and talk to the bartender.

Q. 14. Can you state just what days? Did you make notes at the time of the days and what happened on the various occasions?

A. I have a memorandum, yes.

Q. 15. You can refresh your recollection if you need to by that memorandum on just what days you were there and what occurred on the various occasions?

Mr. Donnellan: I do not think it is competent evidence. I plead surprise. I think it is rather an unfair and unusual proceeding to have a witness of this kind sprung on me in the course of this [fol. 56] litigation to testify to a lot of dates, having had no knowledge of these dates.

The Court: You will have opportunity, as far as that is concerned. The Government can take advantage of evidence wherever it occurs.

Mr. Donnellan: I think I ought to be put in possession of a bill of particulars.

Mr. Clark: I think he got one.

Mr. Donnellan: He has never spoken to me since February 24th about a bill of particulars, and this case has been on the calendar.

The Court: Go ahead.

Mr. Donnellan: I respectfully except to your Honor's ruling.

A. The first day I went there was on April 24th, 1923.

Mr. Donnellan: I object to the witness reading from a paper.

Q. 16. Can you recall what happened on that day?

A. At about three o'clock in the afternoon I went there and walked in and walked up to the bar. I had a glass of beer.

Q. 17. By "beer" what do you mean; near beer?

A. The beer that was served. I asked for a glass of beer.

Q. 18. How much did you pay for it?

A. I paid ten cents for it.

Q. 19. What happened after that?

A. I drank the beer and I walked out.

Q. 20. Was that all that happened on the first visit?

A. That was all that happened on the day of the 24th. I did not observe anything unusual.

[fol. 57] Q. 21. What was the next occasion, and what happened then?

Mr. Donnellan: I object to the witness reading from a paper.
The Court: He can refresh his recollection.

By the Court:

Q. 22. Have you any recollection outside the paper?

A. Not as to the dates.

Q. 23. Refresh your memory from the paper as to the dates?

A. The next visit was on April 25th.

Q. 24. What happened then?

A. Practically the same as on the first visit. I went in and bought a glass of beer and stood there a few minutes drinking the beer, and observed what was going on.

By Mr. Clark:

Q. 25. Whom did you talk with; do you recall; on the first two occasions?

A. The bartender.

Q. 26. Was the defendant Duignan there on those occasions, do you recall?

A. Not that I recall, on the first two occasions.

Q. 27. The next day that you were there was what date?

Mr. Donnellan: If your Honor please, I respectfully object to this witness constantly referring to a written paper.

Q. 28. Can you not recall what dates they were without reference to the paper?

A. I went one day after the other and then I would skip a day.

The Court: Give us your best recollection.

Q. 29. You were there practically every day?

A. Practically, yes.

[fol. 58] Q. 30. Did you try to buy any intoxicating liquor there, and if so, when did you first try to buy that?

Mr. Donnellan: I object as leading.

A. I did, after I had paid several visits to the place and got on what I termed friendly feelings with the bartender.

Mr. Donnellan: I ask that that be stricken out.

By the Court:

Q. 31. Then you talked to him on these prior occasions, had you?

A. Yes, sir.

Q. 32. When did you first ask for whiskey?

A. After I had gone there about fifteen or sixteen times. I went in one morning about half-past eleven. There was nobody there

but Mr. Duignan himself. Previous to this visit I had seen him several times and he had seen me.

Mr. Donnellan: I ask that that be stricken out, about Duignan seeing him.

The Court: That is all right.

A. (continued). He was in his shirt sleeves behind the bar. I walked over to the bar and I bid him the time of day, good morning, and spoke to him, and I asked him if I could get a drink.

By Mr. Donnellan:

Q. 33. What date was this?

A. I will give you the exact date.

Mr. Donnellan: I object to his referring to a paper.

Mr. Clark: How can he tell?

[fol. 59] The Court: He said he had been there fifteen or sixteen times. He can find out the date. You are asking him for a specific date.

By the Court:

Q. 34. What date was it you first asked for whiskey?

A. On May 7th.

Q. 35. Tell us what happened on that day?

A. I asked him for a drink.

Q. 36. That is, you asked Duignan?

A. Yes, sir. He said he had not any. I said, "I feel kind of bad; I was out late last night. I would like to get a drink if I could get one." He said, "I have not got one."

By Mr. Clark:

Q. 37. Had you up to this time on May 7th, had you seen any liquor served there?

Mr. Donnellan: I object to that.

The Witness: I cannot answer unless I refresh my recollection by referring to this paper.

Q. 38. Did you after that buy liquor in that place?

A. Yes, sir, I did.

Q. 39. On what date?

A. On May 26th, I went in, and there was one bartender who I got talking to, and he told the other bartender——

Mr. Donnellan: I object to what one bartender told the other bartender.

Q. 40. Was it in your presence?

A. It was.

Mr. Donnellan: I make an objection to this as not binding on the defendant Duignan.

The Court: I will allow it; exception.

[fol. 60] A. (continued). I told the other bartender to serve me a drink. The other bartender did. He poured the contents of a small vial out into a glass and put it up on the bar, and I drank it. I asked him for a second drink. He gave me the second drink, and I stood there talking awhile, and then I went out.

Q. 41. What did you ask for, and what did you get?

A. I asked him for a drink of whiskey.

Q. 42. Do you know the taste of whiskey?

A. Yes, sir.

Q. 43. This was whiskey?

A. This was whiskey; yes, sir.

Q. 44. How much did you pay for that?

A. I paid him sixty cents a drink.

Q. 45. What did he do with the money?

A. He put it in the cash register, but I could not see the amount he rang up, the total that came up on the cash register, because there was something in front of it. You could not see the amount.

Q. 46. Was Mr. Duignan there or was he not, when you got this drink?

A. No, he was not there on this occasion.

Q. 47. At that time?

A. No, sir; not on this day.

Q. 48. Where were these drinks served, in the back room or at the bar?

A. No, sir; on this occasion they were served on the inner end of the bar; that is, the end of the bar furthest from the street.

Q. 49. After that, did you buy any further drinks, and if so, on what dates and state the circumstances?

A. Any day that I went in afterwards.

Mr. Donnellan: I ask that that be stricken out as too indefinite.

Q. 50. How many days did you go in there?

A. I will have to refresh my recollection.

[fol. 61] Mr. Donnellan: I object to the witness constantly refreshing his recollection.

Objection overruled; exception.

A. On May 28th.

Q. 51. What occurred on that day?

A. I called there about four-fifteen in the afternoon, and I had a conversation with the bartender. I also had some whiskey there. I had two drinks.

Q. 52. What did you pay for them?

Mr. Donnellan: I object.

By the Court:

Q. 53. Tell the circumstances under which you got them?

A. I asked the bartender for a drink of whiskey and he gave it to me. I paid him sixty cents. I asked him for the second drink, and he served me, and he gave it to me. I drank it, and I paid him sixty cents for that drink.

Q. 54. Was that at the bar?

A. Yes, sir, and I told him then on that visit about my going in there one morning—

Mr. Donnellan: I object to this conversation. It was not with the defendant Duignan.

The Court: I do not think it is necessary. If he got some liquor there, the details do not count.

By Mr. Clark:

Q. 55. When after that did you go in there?

A. On June 5th.

Q. 56. Were you alone there or accompanied by some one?

A. Westings was with me.

Q. 57. What occurred on June 5th?

[fol. 62] A. I went in and both bartenders were there. First off we had two glasses of beer. I bought one round of drinks, paying 20 cents for the two glasses, and Westings bought the second round. I then asked the bartender if we could get a drink of whiskey. He told his partner, the other bartender working with him, to fix us up.

Mr. Donnellan: I ask that that be stricken out.

The Court: Denied; exception.

A. (continued). We went into the back room and sat down and had several drinks of whiskey.

Q. 58. They were served to you at the table?

A. They were served in the rear room.

Q. 59. You tasted them all and you knew they were whiskey?

A. Yes, sir.

Q. 60. On this day, did you see Mr. Duignan or not?

A. Yes; Mr. Duignan was in and out of the back room. There were two gentlemen sitting at a table in the back room, and Mr. Duignan came in and sat down and had a conversation with them.

Q. 61. What did they have in front of them, anything?

A. They had what appeared to me as whiskey, the same color.

Mr. Donnellan: I ask that that be stricken out.

The Court: Denied; exception.

Q. 62. What sort of glasses was it brought in?

A. It was brought in in small vials and poured into a glass, poured into an ordinary whiskey glass from this small vial.

Q. 63. These people; did they have the same kind of glasses in front of them?

A. The same as we did.

Q. 64. And Duignan was with them?

A. He sat talking with them.

[fol. 63] Q. 65. How long?

A. He got up once or twice and walked out into the barroom, and went back.

Q. 66. The next occasion was when?

A. On June 6th.

Q. 67. What occurred on that occasion?

A. I went there with Westings and we went into the back room and sat down at a table along the side wall. This waiter who came to wait on us, I asked him for two drinks of whiskey, and he brought them. I paid him for them, and we drank. We sat there talking awhile and Westings ordered two drinks from him, which he brought to us. We drank them and paid for them. I ordered two more drinks, which were served to us, and we drank them and paid for them. After sitting there talking awhile, I asked him if I could get a bottle.

Mr. Donnellan: I object to this conversation, if your Honor please.

The Court: Objection overruled; exception.

A. (continued). He was out behind the bar in the bar room; in fact, the two bartenders were standing there together. I asked them if I could get a pint bottle from them, a half pint, so they said, "Yes." The larger of the two bartenders told the small bartender it was all right to give it to me. I then went back to the back room, and we had another round of drinks, and he brought this half pint bottle down to me, from upstairs. On each occasion he would go upstairs to get the whiskey.

Q. 68. How did you know he went upstairs?

A. He would go out the door leading out to the vestibule into the door leading in the hallway. Then he went upstairs.

Q. 69. Did you hear him walking upstairs?

A. Yes, sir.

[fol. 64] Q. 70. Go ahead.

A. He brought the half pint into us and I paid him \$3 for it. I gave him three one dollar bills, and I put it in my pocket. We had either one or two more rounds after I got the bottle from them.

Q. 71. Was each of these rounds whiskey?

A. Yes, sir.

Q. 72. Did you taste it?

A. Yes, sir.

Q. 73. How much was that altogether?

A. That day we had about six rounds of drinks.

Q. 74. Over what period of time?

A. Within a period of I should say an hour and a half to an hour and forty-five minutes.

Q. 75. When was the next occasion that you were in there?

The Court: We shall have to adjourn now.

Adjourned to March 10th, 1924; 10:30 A. M.

New York, March 10th, 1924—11:30 a. m.

Trial resumed.

JOSEPH O'CONNOR, resumed.

Direct examination.

By Mr. Clark (continued):

Q. 76. I think you were on the stand before and you testified about June 5th—

Mr. Donnellan: Will your Honor instruct the private detectives to step out of the room?

The Court: Yes.

[fol. 65] Q. 77. On June 5th will you state what occurred when you went there?

A. I went there in company with Investigator Westing, purchased two glasses of beer, bought two glasses of beer at the bar; went into the rear room and sat at a table in the rear room and we had several drinks of whiskey there served to us by the bartender, who brought this whiskey from upstairs. He brought them in small vials or bottles and poured it in the whiskey glasses which he set on the table at which we were seated and let it stand there until we drank them; he would pour it out and then he would leave it, the glasses on the table, and we would pay him and he would make change. We would pay him the exact amount; we paid him sixty cents for each drink, and he would then go away.

Q. 78. Was this the first day that you brought Investigator Westing there?

A. Yes, sir, I think it was.

Q. 79. Did you have a conversation on that date or any other day with Mr. Duignan?

A. On the way out Mr. Duignan was sitting in the barroom in his shirt sleeves at a table over on the Eighth Avenue side, the front of the barroom, sitting there reading a paper, and I went over and spoke to him, and Westing was alongside of me, and I told him this was Mr. Westing, a friend of mine, and I said he was all right, and whenever he came in and wanted anything would he give it to him, and he said, "All right," and there was no further conversation.

Q. 80. When did you next go into that place?

A. On the following day.

Q. 81. June 6th?

A. June 6th.

Q. 82. What occurred on that day?

Mr. Donnellan: I object to the witness reading from some papers.
[fol. 66] The Court: He may refresh his recollection.

Mr. Donnellan: Exception.

A. I returned there on June 6th with Westings, and we went into the rear room, in the back room, and sat down at a table, and after

I spoke to the bartender on the way in, and we had several drinks of whiskey there which was served to us in the back room.

Q. 83. How many drinks did you have on the sixth?

A. I don't know. We had several drinks there. I don't just recall how many.

Q. 84. Was Duigan there on that day at all?

A. Yes, Mr. Duigan was in and out of the rear room. There were some other gentlemen sitting in the rear room at a table, and he came in and sat and talked to them for a while.

Q. 85. When next did you go into those premises?

A. June 7th.

Q. 86. Did you go in alone or in company with anybody else?

A. No, I went in in the morning about a quarter of twelve, before noon time, with Westing.

Q. 87. With Westing?

A. Yes, sir.

Q. 88. What occurred on that day?

A. We went into the rear room and had two or three drinks of whiskey there which was served to us by this bartender who brought it from upstairs in the small bottles, and Mr. Duignan was sitting in the cafe, that is the barroom, at a table, reading a paper there, and after we had the drinks we walked out and I bid him the time of day, as I recall; I said, "Good morning," or "a nice day," or something to that effect to him.

Q. 89. And was that your last visit to those premises?

A. That was the last day I went there, yes, sir.

Q. 90. In all these times when you say you had drinks, what you had was whiskey?

A. Yes, sir.

[fol. 67] Q. 91. Are you familiar with the taste of whiskey?

A. Yes, sir.

Q. 92. And it was whiskey, was it, on each occasion?

A. I had asked for whiskey.

Cross examination.

By Mr. Donnellan:

X Q. 93. You said that your occupation, Mr. O'Connor, was that of an investigator?

A. Yes, sir.

X Q. 94. And by that you mean private detective, do you not?

A. If you wish to call it that way.

X Q. 95. That is what is ordinarily called, isn't it, private detective?

A. By some people.

X Q. 96. What is your compensation as a private detective?

Mr. Clark: I object to this, if your Honor please. I do not see the relevancy of that.

The Court: He may ask.

A. While I was working for Mr. Reilly?

X Q. 97. Yes.

A. Five dollars a day.

X Q. 98. And prior to the time you entered Mr. Reilly's employ you were occupied as what?

A. As an investigator for the railroad company.

X Q. 99. That is, you were one of those men who went around settling up claims for damages?

A. No, sir. I was not a claim agent. I was an investigator in the law department.

X Q. 100. What do you mean? What were your duties?

A. My duties were preparing cases for trial in court.

X Q. 101. You are not admitted to the bar, are you?

A. No, sir, I am not.

X Q. 102. Have you ever taken any bar examination?

A. Never.

[fol. 68] X Q. 103. But you have done work around law offices then, more or less, for the last twenty-odd years, haven't you?

A. For the railway company, in their legal department.

X Q. 104. And when you say you were preparing cases for trial, just what work did you do? Go out and see the witnesses and then tell the attorneys what they were going to testify to?

A. No, I went out and interviewed the witnesses and got statements from them.

X Q. 105. You got statements from the various witnesses?

A. Yes, sir.

X Q. 106. And then you reported those statements to the railway companies' attorneys?

A. I turned in written statements of what these witnesses said or the statements or affidavits I obtained from the witnesses.

X Q. 107. What was your compensation with the railway company?

The Court: He need not answer that.

Mr. Donnellan: Exception.

X Q. 108. What was the occasion of leaving the railway company?

A. I resigned.

X Q. 109. Under charges?

A. No, sir.

X Q. 110. Did you resign to go with Dominick Reilly?

A. No, sir. I did not. I had no intention of going with Dominick Reilly.

X Q. 111. When did you resign?

A. I resigned June 6th, three years this coming June.

X Q. 112. And after you resigned what was your occupation?

A. Why, I went with an insurance company, the Commercial Casualty Insurance Company.

X Q. 113. The Commercial Casualty Insurance Company?

A. Yes, sir.

[fol. 69] X Q. 114. And were you an investigator for the Commercial Casualty?

A. Yes, sir.

X Q. 115. How long did you last there?

A. I stayed there about six months.

X Q. 116. And did you resign or were you discharged?

A. There was some differences as to the work there; I did not like the work; I felt they were handing out too many cases a day.

X Q. 117. Did you resign or were you discharged?

A. I would not say I was discharged nor I would not say I resigned. There was dissatisfaction.

X Q. 118. You thought it was better to find more congenial surroundings, I presume; is that it?

A. Well, I was not entirely satisfied with the line of work; that was all.

X Q. 119. Well, you did not resign?

A. Well, if you—no, I did not resign.

X Q. 120. Then you were discharged or dismissed?

A. If you want it that way, yes, sir.

X Q. 121. I don't want it that way, I only want the truth.

A. I am telling you the truth.

X Q. 122. Then you were discharged by the Commercial Casualty Company?

A. Yes, sir.

X Q. 123. After you had been with them for about six months?

A. About six months, yes, sir.

X Q. 124. And who did you go with?

A. I did not do anything, then, for a long time, and I went with Dominick Reilly.

X Q. 125. That is six months; that must have been about December, 1921, was it?

A. Yes, sir.

X Q. 126. After you left the Commercial Casualty, and how long were you without an occupation?

A. Well, I was doing some work on the outside preparing cases outside for myself.

X Q. 127. For whom?

A. Well, for various lawyers.

[fol. 70] X Q. 128. Amongst others who, for instance?

A. Well, there was no one in particular.

X Q. 129. Cannot you recollect the names of any attorneys you worked for?

A. I did not work for any attorney directly.

X Q. 130. What was the nature of your employment or the nature of the work you were doing?

A. I was not doing very much.

X Q. 131. For how long a period?

A. For possibly pretty near a year.

X Q. 132. Did you ever sell any liquor during that year?

A. I was never in the liquor business, no, sir.

X Q. 133. You know what I mean by selling liquor, don't you? I do not necessarily mean owning a cafe; were you dealing in liquor, as what they call a bootlegger, then?

A. Never, never did.

X Q. 134. For a whole year you did nothing?

A. No, sir.

X Q. 135. And I presume you lived on the money that you had accumulated from your previous occupations during that year; is that right?

Mr. Clark: I object to that, if your Honor please.

The Court: He may ask that.

A. I had some money, yes, sir.

X Q. 136. And then after that year elapsed where did you go and who did you work for?

A. I went to work for the Dominick Reilly Detective Agency.

X Q. 137. Is this the first case you worked on for that detective agency?

A. The first case of this kind, yes, sir.

X Q. 138. What other kinds did you work on? Divorce cases?

A. Some divorce cases, yes, sir.

X Q. 139. You have had quite a lot of experience as a private [fol. 71] detective, have you not?

A. Not a private detective, as an investigator.

X Q. 140. As an investigator; what is the distinction between an investigator and a private detective?

A. Well, I never had any authority to arrest anybody.

X Q. 141. You do not think any private detective has, do you?

A. I don't know. Some of them are licensed; I understand they have.

X Q. 142. And you were not licensed?

A. No, sir, I was not.

X Q. 143. And you were not licensed during the time that you worked for Reilly either, were you?

A. No, sir.

X Q. 144. Now, you know Mr. Leslie, do you not, one of the attorneys for the Pall Mall Realty Company?

A. I met Mr. Leslie to go into his office, being sent there from the office of Dominick Reilly to make an affidavit of some papers I served on a case from his office; that is how I met Mr. Leslie.

X Q. 145. You know him, don't you?

A. Never before that time.

X Q. 146. You know him now, don't you?

A. Since meeting him in his office, yes, sir.

X Q. 147. Did you make the affidavit in regard to all these occurrences in Duignan's place in Leslie's office?

A. No, sir, I did not.

X Q. 148. Where did you make that affidavit?

A. Downstairs in the District Attorney's office in this building.

X Q. 149. Who caused you to go there, Dominick Reilly or Mr. Leslie?

A. I was notified from the office of Dominick Reilly to appear down before the District Attorney.

X Q. 150. Who did you ask for when you got here in this building?

A. I asked for Mr. Cohen.

[fol. 72] X Q. 151. Who told you to ask for Mr. Cohen?

A. In the office of Dominick Reilly, I was instructed to inquire for the Assistant District Attorney, Mr. Cohen.

X Q. 152. What instructions were you given by Dominick Reilly before you went to Duignan's place at all? What were you told the nature of your work was to be and what was the object of your work?

A. He did not tell me the object of it nor the nature of it. He called me into the office and he told me to go up to Mr. Duignan's saloon and see if I could buy whiskey there.

X Q. 153. Did he tell you that the landlord was anxious to get rid of Duignan?

A. No, sir, he did not.

X Q. 154. Nothing of that sort was ever mentioned to you?

A. Nothing of that kind, no, sir.

X Q. 155. You were constantly looking at a paper during the time that you were testifying; what is that paper?

A. That is a copy of the affidavit I made in the District Attorney's office downstairs.

X Q. 156. That affidavit was made up from some other memorandum, was it not?

A. No, sir, it was not.

X Q. 157. From your memory?

A. It was made up from notes that I had which I kept.

X Q. 158. Have you still got those notes?

A. No, sir, I have not.

X Q. 159. Did not you keep your original memoranda of cases which you worked on?

A. No, I did not, I turned them all into the office where I was employed.

X Q. 160. Has Dominick Reilly got those notes now?

A. I don't know whether he has or not.

X Q. 161. But you turned them over to him?

A. I turned them into the office, not to him personally.

X Q. 162. What sort of notes were they? Loose scraps of paper?

A. No, sir, they were memorandums of what occurred on each visit.

[fol. 73] X Q. 163. In a note book?

A. No, written on foolscap—on sheets of foolscap paper.

X Q. 164. Just loose sheets?

A. Yes, sir.

X Q. 165. Did you take those all with you when you came over to the office of the District Attorney?

A. I got them from his office and brought them down, and the affidavit was dictated and made from those notes.

X Q. 166. Who dictated the affidavit?

A. I did, myself.

X Q. 167. Would you let me see that paper which you are reading from?

A. Yes, sir (handing counsel paper).

X Q. 168. Your testimony has practically been verbatim of what is contained in this affidavit?

A. Well, that is what occurred.

X Q. 169. I mean, your testimony now has been practically verbatim of what is contained in this affidavit?

A. Yes, sir.

X Q. 170. When did you make this affidavit?

A. I don't recall the date. I think it is on the copy.

X Q. 171. Can you recall any distinct dates as to anything that happened in Duignan's place without refreshing your recollection from this affidavit?

A. Well, yes.

X Q. 172. Now, let us have it. What date can you recollect?

A. The first day that I bought liquor there.

X Q. 173. What date was that?

A. It was on May 26th.

X Q. 174. What happened on that date? What time did you get there at?

A. I went there in the afternoon.

X Q. 175. About what time?

A. I should judge about between two and three or about three o'clock.

X Q. 176. About three o'clock in the afternoon?

A. I think so.

[fol. 74] X Q. 177. What happened?

A. Why, I went in and spoke to the bartender.

X Q. 178. What is his name?

A. The bartender's name, I think, was Connors.

X Q. 179. Was he the bartender that served you?

A. No, sir.

X Q. 180. What happened?

A. I spoke to him and asked him if I could get a drink, and he called this man over—he said I could and he called this other bartender over and told him to give me a drink, and I had one drink, and I paid him sixty cents for it, and then I had a second drink, again paying him sixty cents.

X Q. 181. Where did you stand, in the rear room?

A. On this occasion I think I stood in the barroom.

X Q. 182. In the barroom?

A. I think I did; yes, sir.

X Q. 183. This affidavit recites that you were in there 12.30 P. M. and not three o'clock?

A. That is right, if the affidavit says twelve-thirty; I did not go in there every day at the same time.

X Q. 184. Let us get this straight. You went there once on April 24th, did you?

A. Yes, sir.

X Q. 185. You got no liquor then?

A. No, sir.

X Q. 186. Then you went in on April 25th?

A. Yes, sir.

X Q. 187. Did you get any liquor on that day?

A. No, sir.

X Q. 188. Then you went in on April 26th?

A. Yes, sir.

X Q. 189. Did you get any liquor that day?

A. No, sir.

X Q. 190. April 27th?

A. No, sir.

X Q. 191. April 28th?

A. No, sir.

X Q. 192. And April 30th?

A. No, sir.

[fol. 75] X Q. 193. You did not get any liquor then?

A. No, sir, I did not.

X Q. 194. On May 1st; you did not get any liquor then?

A. No, sir.

X Q. 195. And all those times that you went in there you courted the acquaintance of the bartenders, didn't you; you tried to make yourself known to them?

A. I would talk to them.

X Q. 196. And then you went in again on May 1st, didn't you?

A. Yes, sir.

X Q. 197. And you got no liquor then?

A. No, sir.

X Q. 198. And on May 2nd?

A. If that is on that affidavit.

X Q. 199. I am reading the dates that are on the affidavit, May 2nd?

A. Yes, sir.

Mr. Clark: Ask him if that is a correct copy of the affidavit.

Mr. Donnellan: I assume it is a correct copy. This is the one he testified to from.

X Q. 200. You went in on May 2nd; did you get anything to drink then?

A. No, sir.

X Q. 201. And on May 5th?

A. Yes, sir, I was in there on May 5th.

X Q. 202. Did you get any liquor?

A. No.

X Q. 203. By liquor I mean a beverage containing more than one half per cent of alcohol by volume?

A. No, sir.

X Q. 204. And on May 7th?

A. Yes, sir. I did not get any liquor. I was in there.

X Q. 205. And May 8th?

A. Yes, sir.

X Q. 206. And May 10th; and when you say "Yes, sir" you mean you were in and got no liquor?

A. I was in there and got no liquor. I was in there on May 10th and did not get any liquor.

[fol. 76] X Q. 207. And May 11th?

A. Yes, sir; I was in there on May 11th.

X Q. 208. Did you get any liquor on that day?

A. No, sir.

X Q. 209. How many times were you instructed to go in there?

A. I was not instructed as to the number of times that I should go there.

X Q. 210. Were not you satisfied, after having been in there on this number of times that you could not get any liquor?

A. I had not asked for it on those visits.

X Q. 211. What were you doing all this time, just walking in and bidding the time of day and collecting \$5 from Dominick Reilly?

A. No, sir, I was going in and buying beer that was served to me.

X Q. 212. You were not sent there to buy beer, were you?

A. I was sent there to buy liquor if I could buy it.

X Q. 213. And you were there on all these occasions and never asked for any whiskey?

A. Yes, sir.

X Q. 214. Now, let me refresh your recollection as to what you said in this affidavit about May 7th: "On May 7th I visited Duignan's cafe at 10:40 o'clock in the morning, and the proprietor, Mr. Duignan was behind the bar. I got into conversation with him regarding the Mullen-Gage Act, and after having some beer I asked him for a drink of whiskey, and Duignan said he had nothing in the place." So you did ask for whiskey on that date, anyway, didn't you?

A. Yes, but the bartenders were not there.

X Q. 215. Were not you more anxious to get the whiskey from Duignan than from the bartender, or did you know he was not selling any whiskey?

A. I knew he was selling it because I saw it served.

[fol. 77] X Q. 216. You never saw him serve any whiskey, did you?

A. I saw it served in his presence.

X Q. 217. And although you asked him on this occasion you did not get any?

A. He refused me, yes, sir.

X Q. 218. That was one time prior to May 11th that you asked it, wasn't it?

A. That was the only time.

X Q. 219. You were there on May 15th, were you not?

A. Yes, sir.

X Q. 220. You did not get any whiskey on that occasion, did you?

A. No, sir, I did not.

X Q. 221. You were there on May 16th, were you not?

A. I was.

X Q. 222. You had a conversation with Duignan on that date in regard to whiskey, did you not?

A. I did not, no, sir. On May 16th.

X Q. 223. Yes, sir. You heard a conversation of somebody else with Duignan about whiskey on that date, didn't you?

A. There were two men came in there, yes, sir.

X Q. 224. And they asked Duignan for whiskey?

A. Yes, sir.

X Q. 225. And he refused them?

A. He did not serve them.

X Q. 226. You said in your affidavit: "They asked Mr. Duignan, who was standing behind the bar, for whiskey, and he refused them."

A. He appeared to refuse them to me, yes.

X Q. 227. And you have said that he refused them?

A. Yes, sir, he refused them.

X Q. 228. You visited there again on the 19th of May, didn't you?

A. Yes, sir.

X Q. 229. And you got no whiskey then, either?

A. No, sir.

[fol. 78] X Q. 230. And on May 22nd?

A. I was there, yes, sir.

X Q. 231. So that the first time you allege you got whiskey in these premises was on May 26th?

A. That was the first time, yes, sir.

X Q. 232. Prior to May 26th how many visits had you made there?

A. All the days that you read from that paper.

X Q. 233. Just count them up.

Mr. Clark: I object to that; it is all in the record. What is the use of counting them up?

Mr. Donnellan: I have counted them up, Major, and maybe you will conceded that he was there seventeen different times without getting any liquor prior to May 26th.

X Q. 234. Is that right?

A. That is right, yes.

Mr. Clark: We will concede he did not get any because he did not ask for any.

X Q. 235. You do not mean to say that you—

The Court: Do not go into that. He was there to buy liquor.

Mr. Donnellan: If your Honor please, I respectfully except to your Honor's remark. This man has testified that he was working for Dominick Reilly for the purpose of getting evidence of a liquor violation against Duignan, and that all goes to the question of his credibility. He admitted here that he had been seventeen times before he alleges he got a drink of whiskey.

The Court: All right.

The Witness: That is true.

[fol. 79] X Q. 236. On the 26th you got the drink of whiskey from the bartender, didn't you?

A. Yes, sir.

X Q. 237. What was his name?

A. They called him Tony.

X Q. 238. They called the bartender Tony?

A. I heard him called Tony, and perhaps that was his name.

X Q. 239. What conversation led up to the sale of this whiskey on May 26th, if you can recollect it?

A. I had been talking to the bartender—not this bartender re-

ferred to as Tony. I asked him if I could get a drink of whiskey from him——

X Q. 240. Which bartender is this?

A. Connor.

X Q. 241. What kind of a looking man is Connor?

A. He is a tall man, slim built, dark complexioned, clean shaven.

X Q. 242. Did you ever tell Connor what you were working at?

A. I never did.

X Q. 243. Did he ever ask you what you were working at?

A. He never did.

X Q. 244. You were in there at various hours of the day and night?

A. I was.

X Q. 245. During the seventeen of these visits?

A. Yes, sir.

X Q. 246. And had other people with you on several occasions, too, didn't you?

A. No, sir.

X Q. 247. Were you served with this liquor in the barroom or back room; you say the back room, don't you?

A. I was served in the barroom.

X Q. 248. On May 26th?

A. Yes, sir.

X Q. 249. And you were served again, according to your affidavit, on May 28th?

A. Yes, sir.

X Q. 250. That was also a service by this man named Tony?

A. That is right.

X Q. 251. And again on June 5th, you were also served on June 5th by this man named Tony?

A. Yes, sir.

[fol. 80] X Q. 252. And on June 6th?

A. Yes, sir.

X Q. 253. And Tony gave it to you on that date?

A. Yes, sir.

X Q. 254. And on June 7th?

A. Yes, sir.

X Q. 255. So that you were served on five different days; is that right, according to your affidavit, with whiskey?

A. Yes, sir.

X Q. 256. And this is all by Tony?

A. Yes, sir.

X Q. 257. And most always in the rear room?

A. Yes, sir; in the presence of Mr. Duignan.

X Q. 258. Why do you say, "In the presence of Mr. Duignan"? Why do you interject that in your answer? Do you want to bring home knowledge to Mr. Duignan in your testimony?

A. So, sir.

X Q. 259. I did not ask you whether Duignan was there or not, did I?

A. You did not.

X Q. 260. But you interjected in your answer that you were served in the presence of Mr. Duignan?

A. I was, yes.

X Q. 261. You appeared as a witness on a number of occasions—did you not, in various courts?

A. Yes, sir.

X Q. 262. And in various litigations?

A. I would not say various litigations, no, sir.

X Q. 263. Well, in trials of various actions?

A. Yes, sir.

X Q. 264. You have had a lot of experience on the witness stand, have you not?

A. I have testified several times, yes, sir.

X Q. 265. And you know the object of this proceeding, don't you?

A. I do now.

X Q. 266. What is the object of this proceeding?

A. As I understand it it is to break a lease.

X Q. 267. Yes, break Duignan's lease?

A. Yes, sir.

X Q. 268. And you understand it is the landlord who is trying [fol. 81] to do that?

A. I don't know who is trying to do that, no, sir.

X Q. 269. You understand now that Reilly was working for the landlord, don't you?

A. I don't know who he was working for.

X Q. 270. You know as a fact that Reilly is not a Government official, don't you?

A. I certainly do.

X Q. 271. And you were not a Government official?

A. Absolutely not.

X Q. 272. What have you done since you left Reilly's employ?

A. I have not done anything. I left him a week ago today. I have been in this court most of the time.

X Q. 273. And you are not doing anything now?

A. No, sir.

X Q. 274. Do you expect to go back to his employ after this case is over, to his employ?

A. No, sir; I do not.

X Q. 275. Did not you testify that the first day you went into the premises you asked for a drink of whiskey and you were refused?

A. No, sir, I did not.

X Q. 276. The first time you saw Duignan in there you asked him for a drink of whiskey?

A. No, sir, I did not. I saw him in there a number—I saw him in there on several occasions and spoke to him and talked to him.

X Q. 277. You saw Duignan in there after you have been in that place fifteen or sixteen times, is that right?

A. I saw him there on the second or third visit.

X Q. 278. The first time you asked him for whiskey was on May 7th, then, is that right?

A. As stated in the affidavit, yes, sir.

X Q. 279. Let me read your testimony on that:

"Q. What day was it that you first asked for whiskey"—that is [fol. 82] put by the Court:

"A. On May 7th.

"Q. Is that right?

"A. Yes, sir.

"Q. Tell us what happened on that day?

"A. I asked him for a drink.

"Q. That is, you asked Duignan?

"A. Yes, sir."

What did you say to Duignan when you asked him for a drink that morning?

A. That was the morning he was in there alone.

X Q. 280. That is not an answer to the question I put to you——

A. And he was behind the bar in his shirt sleeves. I walked in and asked him for a drink; he said he did not have any.

X Q. 281. What else did you say to him?

A. I passed some remark about being out the night before, had had some liquor and wanted to get a drink, if I could.

X Q. 282. Did you say you were sick?

A. I did not say I was sick, no, sir.

X Q. 283. Did you say, "I feel kind of bad; I was out late last night"?

A. Yes, sir.

X Q. 284. "I would like to have a drink if I could get one"?

A. Yes, sir.

X Q. 285. You were trying to give Duignan the impression that you were really sick at that time, were you not?

A. Not necessarily.

X Q. 286. You felt he would not sell you any liquor unless you worked up some sort of an excuse or some sort of a story about being sick, didn't you?

A. I did not think I had to be sick to get it from him.

X Q. 287. Why did you tell him you were sick?

A. I did not say I was sick.

X Q. 288. You said you were not feeling right?

A. Yes, sir.

[fol. 83] X Q. 289. What did you mean by that?

A. I thought he——

Mr. Clark: I object. Everybody knows how anybody feels after drinking the night before.

The Court: Yes.

Mr. Donnellan: I do not think so. Some do not drink the night before.

X Q. 290. You told Duignan that you felt kind of bad, didn't you?

A. Yes, sir.

X Q. 291. And you thought you could play on his sympathy in order to get a drink, didn't you?

A. Not on his sympathy, no, I thought he would serve me with whiskey.

X Q. 292. You thought Duignan would do it in that case; isn't that true?

Mr. Clark: I object to that.

A. I did not doubt but what he would.

The Court: Yes, he said that is what he told him that he was sick.

X Q. 293. Duignan didn't give you any drink after telling him that you felt bad, did he?

A. No, sir, he did not.

X Q. 294. As a matter of fact, you never got anything to drink from Duignan, did you?

A. No, sir; not personally, no, sir.

X Q. 295. Although you saw him in there most every time you went in?

A. Yes, almost every time.

X Q. 296. And the only drinks you claim you ever got in there, you got from this man named Tony?

A. That is right.

X Q. 297. You never got a drink from Connor, the man you say [fol. 84] was the other bartender?

A. Not personally; he would tell Tony when Tony served me the drinks.

X Q. 298. Tony generally served you with a little flask that he took out of his pocket; isn't that so?

A. A small bottle.

X Q. 299. That he took out of his own pocket?

A. Out of his own pocket.

X Q. 300. And that is the way Tony always made change, isn't it, out of his own pocket, wouldn't he?

A. Yes, sir, always made change out of his own pocket.

X Q. 301. Where is all this liquor that you say you bought in Duignan's place?

A. There is a bottle turned over to the District Attorney's office.

X Q. 302. One that you got?

A. A bottle that I bought, yes, sir. A half pint.

X Q. 303. That is the only liquor that you have brought to court, isn't it? That is the only liquor which you claim you had that was bought in Duignan's place?

A. That was all, yes, sir, that I had.

X Q. 304. This is the half pint which you claim you bought from Tony on June 6th, isn't it?

A. This half pint, yes, sir; the bottle was full when I bought it.

Mr. Clark: I offer that in evidence.

Marked Plaintiff's Exhibit No. 2.

X Q. 305. Where was Westing during this transaction of June 6th?

A. He was present with me.

X Q. 306. He was with you?

A. Yes, sir.

X Q. 307. And how long had you known Westing?

A. Why, from the time I went to work for Dominick Reilly.

X Q. 308. Had he been an operator for Reilly prior to the time [fol. 85] that you went into Reilly's employ?

A. He had.

X Q. 309. Did you ever tell Tony or Connor that you were sick or not feeling good the same as you told Mr. Duignan?

A. Not that I can recall, no, sir.

X Q. 310. As I gather it, although you had been in there seventeen different times, all of a sudden on the 18th visit you said to the bartender, "I would like to have a little drink," and he sent Tony for it and told him to get it, and Tony brought in this bottle?

A. That was the first time I was served, yes, sir.

X Q. 311. And that was the first time you ever had any conversation about whiskey?

A. No, I had a discussion with the bartender about whiskey, but I never asked him for it.

X Q. 312. Before that?

A. Not until that day.

X Q. 313. How many times do you think it was necessary to go to this corner before you made up your mind to ask for it?

A. Until I was sure I would get it.

X Q. 314. You never asked before the eighteenth visit?

A. No, sir.

X Q. 315. What made you feel that you could not get it?

A. Why, the attitude of the bartender and the way he felt. I asked him for it that day and he gave it to me.

X Q. 316. The way he felt?

A. Yes, he was very friendly.

X Q. 317. He was very friendly that day?

A. Yes, sir.

X Q. 318. What conversation did you have with the bartender on that day?

A. I don't remember exactly the exact conversation.

X Q. 319. Did he appear as though he had been drinking that day?

A. No, he did not.

[fol. 86] X Q. 320. And you saw this man Tony in there on the other seventeen occasions when you had been in prior to that day?

A. No, sir, not on every occasion, he would not be there.

X Q. 321. You observed pretty well the way things were done there, didn't you?

A. I did, yes, sir.

X Q. 322. And you made that observation every time you went in, didn't you?

A. I observed what was going on, yes, sir.

X Q. 323. And yet you did not make any inquiry about getting whiskey until the eighteenth visit?

A. That is true.

X Q. 324. Do you think Mr. Reilly has your original notes as to these visits?

A. I could not tell you whether he has or not.

X Q. 325. Were they left with him?

A. I turned them in to him.

X Q. 326. Before you made this affidavit?

A. Yes, sir.

X Q. 327. Where was this affidavit prepared?

A. Downstairs in this building.

X Q. 328. But you did not have your notes with you at that time?

A. Yes, sir, I did.

X Q. 329. I understood you to say you turned your notes in to Mr. Reilly before you made the affidavit?

A. I turned them in to Mr. Reilly, and when I was told to come down to the District Attorney's office I asked him for the notes because I myself kept no memorandum.

X Q. 330. Then you got them back from him?

A. I got them back from him and then returned them to him.

X Q. 331. Have you ever been convicted of a crime?

A. No, sir.

[fol. 87] X Q. 332. How many other investigations involving liquor have you made?

A. This is the only one.

X Q. 333. Are you married?

A. I am.

X Q. 334. Where do you live?

A. I live at 853 Faile Street, Bronx.

X Q. 335. How long have you lived there?

A. Ten years or more.

X Q. 336. And have you any children?

A. I have.

X Q. 337. How many?

A. Two.

X Q. 338. How big a room is the barroom proper in these premises?

A. The barroom proper?

X Q. 339. Yes.

A. It is the full width of the building on the Eighth Avenue side and extends back, I should judge, about thirty-five, forty feet.

X Q. 340. And what sort of a bar is it?

A. It is a straight bar; there is curves on the Eighth Avenue side, and then it runs back toward the rear of the barroom. There is a space to go behind the bar at the rear end.

X Q. 341. Is it a straight bar all the way through?

A. Yes, sir.

X Q. 342. All the way?

A. Yes, sir; it was at that time.

X Q. 343. Parallel with the wall?

A. Yes, runs straight from front to rear.

X Q. 344. And parallel with the south wall of the building? You know what parallel means?

A. Yes, sir, I do.

X Q. 345. It must run in the same direction?

A. Exactly.

X Q. 346. You were in those premises how many times all told, about twenty-five times?

A. About that.

X Q. 347. And, of course, every time you went in you made an observation as to the layout of the place?

A. I knew the layout.

[fol. 88] X Q. 348. You could not help but see it?

A. Yes, sir.

X Q. 349. And that bar runs along in front of the south wall just the same as this desk stands in front of this wall?

A. Exactly.

X Q. 350. A straight bar?

A. Yes, sir.

X Q. 351. You are sure of that?

A. Yes, sir.

X Q. 352. You are positive of that?

A. I am.

X Q. 353. There cannot be any mistake?

A. No.

X Q. 354. As a matter of fact don't you know, Mr. O'Connor, that that is a horseshoe bar in this place?

A. Well, as I recall it—

X Q. 355. And it is not a straight bar at all?

A. I think it was a horseshoe, it may be a horseshoe.

Mr. Donnellan: I move that be stricken out, if your Honor please.

The Witness: Now, that you call it to my attention, it is a horseshoe bar in the center.

X Q. 356. Then your testimony as to the shape of this bar is wholly wrong when you say you are positive that it was a straight bar, isn't it?

A. Now, that you ask me—

X Q. 357. And your recollection as to what else happened in that place is no better than what happened as to the shape of the bar; isn't that true?

A. Yes, it is.

X Q. 358. Do you mean to say that you have been in there twenty-five times and swear positively that it was a straight bar, and now that I call it to your attention—

A. Now, that you call my attention to it I recall that it is in the center and a circular bar or a horseshoe bar.

X Q. 359. Did Mr. Reager tell you when he testified here on Fri-
[fol. 89] day also that it was a straight bar?

A. I don't know Mr. Reager.

Mr. Donnellan: Stand up, Mr. Reager.

(Mr. Reager stands up.)

X Q. 360. Did anyone tell you that Reager testified that it was a straight bar in these premises?

A. No one spoke to me about Mr. Reager at all or what he has testified to.

X Q. 361. As a matter of fact, Mr. O'Connor, isn't it a very large circular or horseshoe bar?

A. In the center it is.

X Q. 362. That comes out way into the center of the barroom?

A. Not way out, no, sir.

X Q. 363. Comes out about fifteen feet from the south wall in the center, doesn't it?

A. No, it does not.

X Q. 364. Do you know at all whether it is a straight bar or a circular bar?

A. I know it is a circular bar.

X Q. 365. Why did you swear a moment ago positively that it was a straight bar?

A. That was the best of my recollection at the time, that it was a straight bar.

Redirect examination.

By Mr. Clark:

R. D. Q. 366. Mr. O'Connor, on these seventeen occasions when you went in there and did not get a drink, did you see any drinks served to other people?

A. Yes, on different occasions.

Mr. Donnellan: I object to that as not proper on rebuttal.

The Court: That is re-direct.

R. D. Q. 367. This bottle which has been put in evidence, how [fol. 90] much did you pay for that?

A. I paid \$3 for it.

R. D. Q. 368. Did you taste it or did you take it full?

A. I got it full and took it that way; I did not taste it.

R. D. Q. 369. Did you deliver it to the United States chemist?

A. It was delivered to this office.

R. D. Q. 370. Who in this office did you deliver it to?

A. I did not deliver it personally.

R. D. Q. 371. You did not deliver it personally?

A. No, sir.

R. D. Q. 372. Who did?

A. That I don't know.

R. D. Q. 373. Where did you deliver it?

A. I delivered it to Dominick Reilly's office.

R. D. Q. 374. You are positive that that is the bottle?

A. Yes, sir.

R. D. Q. 375. Have you looked at it?

A. No, sir; I have not.

R. D. Q. 376. Is that your handwriting on it?

A. That is my writing, yes.

R. D. Q. 377. And that label was put on at the time you got it?

A. And sealed.

R. D. Q. 378. Did you ever have any conversation with Connor about getting drinks there?

Mr. Donnellan: I object to that as improper rebuttal, irrelevant, incompetent and immaterial and not binding on the defendant.

The Court: Which?

Mr. Clark: He seems to have a head bartender——

The Court: He has gone into that, about his various talks on cross-examination.

Mr. Clark: This was some additional conversation.

[fol. 91] R. D. Q. 379. Did you have any conversation with Connor about Duignan not serving you with any drinks?

Mr. Donnellan: I object to that, not binding in any way on this defendant.

The Court: Yes, I think so. I will sustain the objection.

Mr. Clark: Exception.

Recross-examination.

By Mr. Donnellan:

R. X Q. 380. How much liquor did you take out of that half pint when you delivered it to Mr. Reilly?

A. I did not take any out.

R. X Q. 381. Did you taste it?

A. No, sir; I did not.

R. X Q. 382. You did not pull the cork?

A. No, sir.

R. X Q. 383. Did you deliver it to Reilly in the same condition that it was in at the time that Tony delivered it to you?

A. Exactly the same condition; yes, sir.

R. X Q. 384. What did you tell Reilly at the time you handed it over to him?

A. I told him that was the half pint bottle I purchased at Mr. Duignan's.

R. X Q. 385. It did not have any label on it——

A. Not at that time.

R. X Q. 386. It was a plain bottle?

A. Yes, sir.

R. X Q. 387. And you turned it over in the same condition that you got it in?

A. Yes, sir.

R. X Q. 388. And you do not know what Reilly did with it, do you?

A. Well, he labeled it and sealed it in my presence there. After that I don't know, no, sir.

R. X Q. 389. Did Reilly make the inscription on it?

A. I wrote that label that is on the bottle.

[fol. 92] R. X Q. 390. Who did the sealing of it?

A. He sealed it, yes, sir.

R. X Q. 391. Not you?

A. In my presence, while I was writing out the label.

R. X Q. 392. How did he seal it?

A. With sealing wax.

R. X Q. 393. At that time you do not know whether it contained a red liquid or whiskey, or what it was, do you?

A. Well, I bought it for whiskey.

R. X Q. 394. You did not even think of tasting it?

A. I did not taste it no, sir.

R. X Q. 395. Is that the seal that Mr. Reilly put on it?

A. I cannot see from here whether there is any lettering on the seal or not.

R. X Q. 396. Look at it?

A. Yes, that is the seal.

R. X Q. 397. That is the seal he put on it?

A. I believe—

R. X Q. 398. Do you know; you were there at the time, were you not?

Mr. Clark: How can he tell?

The Court: Let him interrogate the witness.

A. I don't know whether that is the seal, but he sealed it with sealing wax. We had sealing wax at that time. Now, whether he put any markings on the wax, I do not know.

R. X Q. 399. Take a look at that seal and see if that is the seal that Reilly put on it?

Mr. Donnellan: May I ask the witness to go to the window and examine it?

The Court: Yes; go and examine it.

A. Why, I can examine it here. I cannot state whether that is the seal that he put on or not.

R. X Q. 400. You do not know, do you?

A. No, sir.

[fol. 93] R. X Q. 401. How long did Reilly have that bottle in his possession?

A. That I could not tell you.

R. X Q. 402. What date did you turn it over to him?

A. The date on the label.

R. X Q. 403. On June 6th?

A. Yes, sir.

R. X Q. 404. And is that the last time you saw the bottle?

A. That is the last time, yes, sir.

R. X Q. 405. When you turned it over to Reilly on June 6th?

A. Yes, sir.

R. X Q. 406. That is the last time you seen this bottle until you saw it in court now?

A. That is true.

R. X Q. 407. Then you did not deliver that to the chemist at all, did you?

A. No, sir, I did not.

R. X Q. 408. And it must have been somebody else?

A. I do not know who delivered it.

R. X Q. 409. You are positive you did not?

A. No, I did not.

R. X Q. 410. Although this was the bottle that you bought or allege now that you bought in Duignan's place?

A. Well, that was the bottle, yes, sir.

R. X Q. 411. Did Reilly ever tell you what he did with that bottle?

A. No, sir, he never did.

R. X Q. 412. Did Reilly tell you how long he had the bottle?

A. No, sir.

R. X Q. 413. Did Westing ever tell you what happened to that bottle?

A. No, sir.

R. X Q. 414. Was Westing with you at the time you turned it over to Reilly?

A. He was.

R. X Q. 415. And that was on what date?

A. That was the date the bottle was bought, on June 6th, if I recall rightly.

R. X Q. 416. What time of day did you turn it over to Reilly?

A. Why, it was in the afternoon; in the neighborhood of four o'clock or four-thirty.

R. X Q. 417. You came direct from Duignan's place to Reilly's office; is that it?

A. Yes, sir.

[fol. 91] R. X Q. 418. Where is Reilly's office?

A. 225 Fifth Avenue.

R. X Q. 419. Is that the Dominick Reilly that used to be a policeman?

A. I understand he was a former police captain.

R. X Q. 420. Were you ever in the police department?

A. No, sir.

R. X Q. 421. Did you ever apply for the police department?

A. Never did.

R. X Q. 422. Were you ever in the fire department?

A. Never.

R. X Q. 423. That is the only sample of whiskey, though, that you got out of all your visits to the Duignan premises, isn't it?

A. No, sir. Westing has a sample on that day that I was with him.

R. X Q. 424. I will ask you again; that is the only sample of whiskey that you got from all your visits at the Duignan premises? Do you understand that question?

A. Personally, yes.

R. X Q. 425. Is it or is it not?

A. That is the only bottle I ever bought.

R. X Q. 426. You have not saved a sample of the whiskey which you claim you got from May 26th, have you?

A. No, not on May 26th.

R. X Q. 427. Although you had two drinks on that day?

A. Bought two drinks, yes, sir.

R. X Q. 428. And you have not a sample of the whiskey which you claim you bought on May 28th?

A. No, sir, not on May 28th.

R. X Q. 429. And you have not a sample of the whiskey which you claim you bought on June 5th?

A. Yes, sir; on June 5th I have a sample.

R. X Q. 430. Is that this sample?

A. No, sir, another sample.

R. X Q. 431. That you got?

A. I haven't got it.

[fol. 95] R. X Q. 432. I am asking you if you have got it?

A. I haven't got it, no, sir.

Mr. Clark: He gave it to the chemist.

Mr. Donnellan: Now, Major, you should not make those remarks. According to the testimony the last resting place of this bottle was Reilly's and not the chemist's at all.

R. X Q. 433. And you have not any sample of the whiskey which you bought on June 7th, either, have you?

A. The only sample I had is on June 5th.

R. X Q. 434. June 5th?

A. Yes, sir.

R. X Q. 435. That is a sample that your partner has, isn't it?

A. I don't know.

R. X Q. 436. Or is that this sample?

A. No, sir, it is not that sample.

R. X Q. 437. Where is that sample that you have that you bought on June 5th, of the liquor you bought on June 5th?

A. It was turned into the office.

R. X Q. 438. Did you bring it to court here?

A. No, sir, I did not.

HENRY WESTING, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination.

By Mr. Clark:

Q. 1. Mr. Westing, you are an investigator employed by whom?

A. Dominick G. Reilly Detective Agency.

Q. 2. How long have you been employed there?

A. About five years.

Q. 3. Where were you employed before that?

[fol. 96] A. Before that I was working as an ironworker with Thomas Williams.

Q. 4. What business?

A. T. A. Williams Iron Works on West 99th Street.

Q. 5. An ironworker?

A. Yes, sir.

Q. 6. Do you know the Duignan Cafe at Eighth Avenue and 42nd Street?

A. I do.

Q. 7. Will you state when you first went in there and what occurred?

A. On June 4th, 1923.

Q. 8. What occurred?

A. I was served with liquor. I went in with O'Connor, with Mr. O'Connor.

Q. 9. Yes.

A. Went up to the bar and we had a couple of drinks. He introduced me to a bartender named Connors, and we had a couple of drinks of beer at that time and then O'Connor asked the bartender Connors if he could get anything else and he said, "Yes"; he called a party by the name of Tony; he took out two glasses—

Mr. Donnellan: I ask that that be stricken out as not binding in any way on this defendant.

The Court: This is what happened on the premises.

Mr. Donnellan: Exception.

Q. 10. He called Tony; what happened after that?

A. He served us with liquor in the back room.

Mr. Donnellan: I ask that that be stricken out.

The Court: Denied.

Q. 11. Who did?

A. Tony.

Q. 12. What did he serve you with?

A. Whiskey.

Q. 13. Do you know the taste of whiskey?

A. Yes, sir.

[fol. 97] Q. 14. Did you taste this?

A. Yes, sir.

Q. 15. Was it whiskey?

A. Yes, sir.

Q. 16. What did Tony do while you were drinking?

A. He would leave—sometimes he would stand there and take the glasses away, sometimes he would leave it there and go out to the bar, go outside.

Q. 17. What did he do when you would pay him?

A. He makes change out of his own pocket and goes outside, and then you would hear the cash register ring.

Q. 18. How long were you there on June 4th?

A. About an hour; about thirty to forty-five minutes.

Q. 19. Did you see Mr. Duignan there?

A. I did not, not that day.

Q. 20. When were you next in that place?

A. June 5th.

Q. 21. What occurred on that occasion?

A. We were served with beer at the bar and served with whiskey in the rear room by Tony.

Q. 22. Was Mr. Duignan there on that day?

A. I did not see him, no, sir.

Q. 23. When did you next go in there?

A. On the 6th.

Q. 24. Were you with O'Connor on these days?

A. Yes, sir.

Q. 25. What occurred on the sixth?

A. On the sixth we were served with liquor in the rear room and Operator O'Connor bought a half pint of whiskey from Tony and paid him \$3 for it.

Q. 26. When did you next go in there?

A. On the seventh.

Q. 27. What occurred on that day?

A. On the seventh we had a couple of drinks of whiskey in the rear room. As we came out of the rear room Mr. O'Connor introduced me to Mr. Duignan and he told him any time I came in was it all right, and he said "Yes."

Q. 28. That was on your way out?

A. On the seventh, yes, sir.

Q. 29. And after that did you go in with O'Connor again?

A. No, sir, not on the seventh.

Q. 30. Did you go in after that on another occasion?

A. Yes, sir.

Q. 31. With whom?

A. With Federal Agent Reager.

Q. 32. On what date?

A. On the eighth.

Q. 33. What occurred on that day?

A. We had a beer at the bar and had whiskey in the rear room served by Tony.

Q. 34. On any of those occasions was Mr. Duignan there as far as you recall?

A. Only on the seventh and eighth, that I can remember.

Q. 35. Do you remember him being there on the eighth?

A. I do, yes.

Q. 36. Where was he on the eighth?

A. On the eighth, as we entered the saloon he was at the end of the bar, and then, when we were going out from the rear room he was standing at the lunch counter.

Q. 37. Which end of the bar, the front end of the rear end?

A. The rear end of the bar.

Q. 38. Near the back room where you were sitting?

A. No. Before you go into the barroom there is a partition between the bar and back room.

Q. 39. Is there a doorway there?

A. Yes, sir.

Q. 40. Could he see in the back room or not?

A. No, sir, not from there.

Q. 41. Did you taste the drinks that you had in those glasses?

A. Yes, sir.

Q. 42. Were they all whiskey?

A. Yes, sir.

[fol. 99] Q. 43. Did you take a sample of one of those drinks?

A. I did.

Q. 44. I show you a bottle and ask you whether that bottle contains the sample and what time it was?

A. That was taken on the fifth, fifth of June.

Q. 45. The drink you had on the fifth of June?

A. Yes, sir.

Q. 46. Did you put it in that bottle?

A. Yes, sir.

Q. 47. What did you do with it?

A. Brought it to the office, sealed it in the office in the presence of O'Connor.

Q. 48. And what was done with it in the office?

A. Kept there until the seventh of June, in the safe, as far as I know.

Q. 49. In the safe?

A. Yes, sir; in the safe.

Q. 50. Where did you get it from on the 7th of June?

A. From the office.

Q. 51. And did you get another bottle at the same time?

A. Yes, sir.

Q. 52. Is this the bottle which you got on the seventh of June also?

A. Yes, sir.

Q. 53. What did you do with those two bottles?

A. On the seventh of June in the afternoon we brought them downstairs to the office of District Attorney Cohen.

Q. 54. And after you had been in his office what did you do with them?

A. I delivered them upstairs to the chemist.

Q. 55. On the fifth floor?

A. Yes, sir.

Mr. Clark: I offer this bottle in evidence.

Mr. Donnellan: I object, if you Honor please, on the ground that it is not properly connected.

Overruled. Exception.

Marked Plaintiff's Exhibit No. 3.

[fol. 100] Cross-examination.

By Mr. Donnellan:

X Q. 56. Mr. Westing, you are what is known as a private detective, are you not?

A. Yes, sir.

X Q. 57. And you have been following that occupation for how many years?

A. Five years.

X Q. 58. What business did you have with these iron-men prior to the time you entered the Reilly's?

A. As a helper, with Williams.

X Q. 59. Working on buildings?

A. Yes, sir.

X Q. 60. How long had you been with him?

A. Oh, five months.

X Q. 61. And prior to that time?

A. Chalmers Motor Car Company.

X Q. 62. What have you done for them?

A. A helper.

X Q. 63. In their factory?

A. Yes, sir.

X Q. 64. And prior to that time?

A. Dougherty's Detective Bureau.

X Q. 65. A detective agency?

A. Yes, sir.

X Q. 66. So that you were with Dougherty's Detective Agency sometime ago?

A. Yes, sir.

X Q. 67. Then you became a mechanic for the Chalmers Automobile Company?

A. Yes, sir.

X Q. 68. And you went from there to be a helper in an ironworks?

A. I was a helper before. I went in the Chalmers from the ironworks.

X Q. 69. The Chalmers was the last employment prior to the time you went with Reilly?

A. Yes, sir.

X Q. 70. So that you have been a private detective at two different periods and in between you have been a helper in an ironworks?

A. Yes, sir.

X Q. 71. How often have you been to Duignan's place?

A. How often have I been to Duignan's place?

X Q. 72. Yes.

A. I was in on the 4th, 5th, 6th, 7th and 8th.

[fol. 101] X Q. 73. You are sure of those dates, are you?

A. Yes, sir.

X Q. 74. And on each of those occasions you were accompanied by an investigator, so-called, O'Connor?

A. Yes, all but the eighth.

X Q. 75. You are positive of those dates?

A. Fourth, fifth, sixth and seventh.

X Q. 76. There cannot be any mistake about them?

A. No, sir.

X Q. 77. Were you with O'Connor at the time he drew up this affidavit?

A. I was; not when he signed the affidavit.

X Q. 78. You were there when he dictated it?

A. Yes, sir.

X Q. 79. And he was there with you on the fourth?

A. On the fourth, yes, sir, he was there on the fourth with me, in the store.

Mr. Donnellan: May I show this witness the affidavit of O'Connor?

The Court: Yes.

X Q. 80. I ask you to glance through that affidavit and see if there is any record of any visit made by O'Connor to Duignan's premises on June 12th?

A. No, sir, not as far as I can see. Twenty-eighth to the fifth.

X Q. 81. Then you were not there on the fourth?

A. I was.

X Q. 82. Although O'Connor did not put it in this affidavit?

A. That is something I don't know.

X Q. 83. What makes you so sure you were there on the fourth?

A. What?

X Q. 84. What makes you so sure that you were there on the fourth, whereas O'Connor does not mention anything about that visit on that date?

A. Because I know I was there.

[fol. 102] X Q. 85. I will ask you again what makes you so sure and so certain?

A. By looking at the previous reports.

X Q. 86. And you studied those very carefully?

A. I did not; just looked over the dates.

X Q. 87. But you looked over those dates before you came to court?

A. Yes, sir.

X Q. 88. Did you make an affidavit for the District Attorney also?

A. I did, sir.

X Q. 89. At the same time that O'Connor made his?

A. I swore the following day, on the eighth.

X Q. 90. Have you got that affidavit?

A. I have not.

Mr. Donnellan: May I ask the District Attorney if he minds letting me see that affidavit.

Mr. Clark: I do not see why I should. He has not refreshed his recollection by it at all.

The Court: That is a matter for you to determine, whether you want to give it up or not.

Mr. Clark: I will not give it up.

X Q. 91. You say you have not a copy of the affidavit which you made—

A. I have not.

X Q. 92. For the District Attorney?

A. No, sir.

X Q. 93. On June 4th how many drinks of whiskey were served to you and O'Connor?

A. I guess we had about three apiece.

X Q. 94. Not what you guess; you are not guessing here, are you?

A. About three.

X Q. 95. Are you only guessing here? A. I cannot exactly say the amount. That I can't remember.

X Q. 96. Now, I will ask you again: Are you guessing as to what happened in Duignan's place?

A. I am not guessing.

[fol. 103] X Q. 97. Why did you say you guessed it was two or three?

A. I cannot exactly tell the amount.

X Q. 98. Can you tell whether you had any at all or not?

A. I can.

X Q. 99. You had at least two or three?

A. Yes, sir.

X Q. 100. On June 4th?

A. Yes, sir.

X Q. 101. And O'Connor had the same?

A. Yes, sir.

X Q. 102. And they were served by Tony?

A. Yes, sir.

X Q. 103. And they were served in the rear room?

A. Yes, sir.

X Q. 104. And they were taken out of Tony's pocket?

A. From Tony, out of his pocket, yes, sir.

X Q. 105. And on each occasion Tony made change out of his pocket?

A. Yes, sir.

X Q. 106. So you did not see anything run up on the cash register?

A. Only on the eighth, as I left the premises \$1.20 was run up on the cash register.

X Q. 107. As you were leaving?

A. Yes, sir.

X Q. 108. On the other occasions you merely heard the cash register ring?

A. Yes, sir.

X Q. 109. And you sat in the rear room?

A. Yes, sir.

X Q. 110. And there was a solid partition between that and the barroom?

A. Yes, sir.

X Q. 111. What kind of a barroom is this?

A. A bar is on the south side of the building and a lunch counter in the front on the north.

X Q. 112. Quite a large lunch counter?

A. Yes, sir.

X Q. 113. What sort of a bar is it?

A. An ordinary bar, mahogany wood, all the length of the room.

X Q. 114. Running from the front of the store to the rear?

A. Yes, sir.

[fol. 104] X Q. 115. And quite long?

A. Yes, sir.

X Q. 116. And parallel with the south wall of the building?

A. Yes, sir.

X Q. 117. A straight bar?

A. Yes, sir.

X Q. 118. You are positive of that?

A. I won't swear. On the east side of the bar I cannot tell if there was a square stand there or not, or anything.

X Q. 119. But you are sure that the bar is on the south side of the building and parallel to the south wall of the building?

A. Yes, sir.

X Q. 120. In a straight line?

A. Yes, sir.

X Q. 121. You cannot be mistaken on that, can you?

A. No, sir.

X Q. 122. And you were in these premises on how many different occasions?

A. Fourth, fifth, sixth, seventh and eighth of June.

X Q. 123. About how many feet long is this bar?

A. Well, about twenty-five feet.

X Q. 124. When you go out on these investigations you make a close observation of everything that you see happens, don't you?

A. Yes, sir.

X Q. 125. You have very keen sight in regard to various things that might happen in your presence that pertain to the case you are working on, don't you?

A. Yes, sir.

X Q. 126. And you consider yourself a very good investigator, don't you?

A. No, sir.

X Q. 127. You consider yourself very mediocre, don't you?

A. No, sir.

X Q. 128. Have you ever been to Mr. Leslie's office?

A. No, sir.

X Q. 129. Did Mr. Riley tell you what the object of the visit to Mr. Duignan's was?

A. To go with Operator O'Connor, accompany Operator O'Connor.

X Q. 130. Did he tell you that the landlord was trying to break Duignan's lease?

A. No, sir.

[fol. 105] X Q. 131. What did you say Duignan was accused of?

A. We were sent up there to see if we could get a purchase of liquor.

X Q. 132. You knew it was not a divorce case?

A. No, sir, I did not.

X Q. 133. You knew Duignan's wife was not suing him for divorce?

A. I did not.

X Q. 134. You were told to go up there and try to get liquor?

A. That is all, purchase whiskey if we could get it.

X Q. 135. And O'Connor said he could show you how to get liquor; is that right?

A. Yes, sir.

X Q. 136. And O'Connor said you could get the liquor from this man Tony, didn't he?

A. He did not.

X Q. 137. What did O'Connor say about him getting liquor?

A. Just that he was served by a party named Tony before.

X Q. 138. He told you that?

A. Yes, sir.

X Q. 139. And he told you that was the only one that ever served liquor there?

A. As far as I know.

X Q. 140. Did you ever meet anybody connected with the Pall Mall Realty Company?

A. No, sir.

X Q. 141. Do you know who owns this building?

A. No, sir.

X Q. 142. Do you know what this case is about?

A. No, sir; not until after.

X Q. 143. What did you think they were trying to do with Duignan in this case, put him in jail?

A. I don't know. For violating the Federal law.

X Q. 144. You are not a Federal officer, though, are you?

A. No, sir.

X Q. 145. What do you suppose is the reason that the Federal authorities are using you, a private detective, in this case?

A. Using me?

[fol. 106] X Q. 146. Yes.

A. The Federal authorities?

X Q. 147. Yes.

A. I don't know; as a witness.

X Q. 148. You were in constant consultation with the Assistant District Attorney's office, though, were you not?

A. No, sir.

X Q. 149. You saw Mr. Cohen, did you not?

A. Yes, sir.

X Q. 150. And you saw the chemist, did you not?

A. Yes, sir.

X Q. 151. And you made your affidavit to him, did you not?

A. Yes, sir.

X Q. 152. Who did you make your affidavit before?

A. In front—it was sworn by a party in floor below. I could not remember his name.

X Q. 153. That was another party, then?

A. Yes, a notary public downstairs.

X Q. 154. So you came in contact with the chemist?

A. Yes, sir.

X Q. 155. And with Mr. Cohen, who was then an Assistant District Attorney?

A. Yes, sir.

X Q. 156. And with the party that drew your affidavit?

A. That I swore to the affidavit before a notary public.

X Q. 157. Where was the affidavit drawn up?

A. Downstairs—up in this building, I could not say.

X Q. 158. Did you dictate it?

A. I did.

X Q. 159. From notes?

A. No, sir—from notes of this at the office, yes, sir.

X Q. 160. You are quite sure of that, are you not?

A. Yes, sir.

X Q. 161. Have you got those notes?

A. In the office.

X Q. 162. In Mr. Reily's office?

A. Yes, sir.

X Q. 163. Are they there now?

A. They are supposed to be there, as far as I know.

[fol. 107] X Q. 164. You did not bring them here to court, did you?

A. No, sir.

Recess.

X Q. 165. Mr. Westing, did you see Mr. O'Connor during the noon recess?

A. No, sir.

X Q. 166. You did not talk to him at all since you were on the stand this morning?

A. No, sir. I only asked him where he was going to eat, for dinner.

X Q. 167. So you did ask him where he was going for dinner?

A. I asked him whether he was going for dinner, and he said up-town.

X Q. 168. You did not ask Mr. O'Connor how it was that he left out June 4th of an alleged visit at Duignan's place, did you?

A. I did.

X Q. 169. Then you did talk to him?

A. Afternoon, after the dinner hour.

X Q. 170. Then there is something about the case which you did discuss with him?

A. Yes, I did.

X Q. 171. And a moment ago you said you did not talk to him?

A. That was after dinner, not before.

X Q. 172. You are very technical as to whether it was before or after dinner, are you not?

A. Yes, sir.

X Q. 173. You understood the purport of my question was did you talk to him since you left the witness stand, and you said no, didn't you?

A. I did.

X Q. 174. You have talked to him about this case?

A. I have.

X Q. 175. And you told him that you testified that you and he were in Duignan's place on June 4th whereas his affidavit did not recite any visit on that date?

[fol. 108] A. I said I had it in my report, as I was there.

X Q. 176. He said he did not put it in his report because you were there; is that right?

A. No, sir.

X Q. 177. What did he say to that?

A. What?

X Q. 178. What explanation—

A. He didn't say anything.

X Q. 179. You were not in the court room when he was testifying, were you?

A. No, sir.

X Q. 180. You are now sure that both of you were there, though, on June 4th?

A. I was.

X Q. 181. No, whether you were or not?

A. I am, yes, sir.

X Q. 182. You are?

A. Yes, sir.

X Q. 183. Positive about that?

A. Yes, sir.

X Q. 184. And if he does not mention that date, that is a mistake on his part?

A. Yes, sir.

X Q. 185. What else did you say to him about your testimony here?

A. Nothing else that I know of.

X Q. 186. Where did you have this conversation about June 4th?

A. Right outside, in the hall.

X Q. 187. Right now?

A. Before we came in here.

X Q. 188. Who brought up the subject, you or he?

A. I did.

X Q. 189. But you know it had been omitted from his affidavit?

A. Yes, sir; by your showing it to me.

X Q. 190. But you have not got your original affidavit here, have you?

A. No, sir, I have not.

X Q. 191. Have you endeavored to find your notes during the noon recess?

A. No, sir.

X Q. 192. Have you been over to Reilly's office?

A. No, sir.

X Q. 193. Are you working for Reilly now?

A. Yes, sir.

X Q. 194. Are you on a liquor case now?

A. No, sir.

[fol. 109] X Q. 195. Do you do much divorcee work?

A. Occasionally.

X Q. 196. And is that the kind of work you did for Dougherty when you worked for him?

A. No, sir.

X Q. 197. Are you one of these so-called divorce detectives?

A. No, sir.

X Q. 198. On June 4th you say you went there with O'Connor, didn't you?

A. Yes, sir.

X Q. 199. And did O'Connor have a conversation with the bartender before you got the drink?

A. Yes, sir.

X Q. 200. What did he say to the bartender?

A. He told him I was an ironworker, and he asked him if it was all right—

X Q. 201. What is that?

A. He asked him if it was all right for a drink; he told him I was a friend of his and that I was an ironworker.

X Q. 202. That was on June 4th?

A. Yes, sir.

X Q. 203. On that day O'Connor told C. nors you were an ironworker?

A. Yes, sir.

X Q. 204. You were not, though; you were a detective?

A. I was.

X Q. 205. Did he say anything about you being sick or not feeling good?

A. No, sir.

X Q. 207. Did he say you had a bad night with him?

A. No, sir.

X Q. 208. But you are sure that was on June 4th, are you not?

A. Yes, sir; when we went in there. The first day I was in that place was June 4th.

X Q. 209. Suppose I were to tell you that O'Connor testified that it was on June 5th that he first brought you there?

A. I was not.

X Q. 210. If he so testified, that was not correct?

A. Yes, sir, I was, this is the fourth.

X Q. 211. Suppose I were to say that on June 5th O'Connor said [fol. 110] that he told the bartender that Westing was all right, give him a drink?

A. I say this is the fourth.

X Q. 212. You say it is the fourth?

A. Yes, sir.

X Q. 213. Well, either one of you must be wrong in regard to the date; that is self-evident, isn't it?

A. Yes, sir.

X Q. 214. And you say he is wrong?

A. Yes, sir.

X Q. 215. And was Duignan there on that occasion?

A. No, sir.

X Q. 216. Was Duignan there on the fifth?

A. I did not see him there on the fifth.

X Q. 217. You did not see him on the fifth?

A. No, sir.

X Q. 218. You are sure of that?

A. Yes, sir; I did not see him.

X Q. 219. Suppose I were to tell you that O'Connor said on the fifth, when he said to the bartender that you were all right, that Duignan was sitting there in his shirt sleeves?

A. I did not notice him.

X Q. 220. That is not so, either, is it?

A. I did not notice Mr. Duignan at that time.

X Q. 221. There was nothing to prevent you from noticing him—

A. I did not notice Mr. Duignan at that time.

X Q. 222. Have you been up to the premises since you left the witness stand at one o'clock?

A. No, sir.

X Q. 223. Have you talked to anybody about the way the bar is laid out there?

A. No, sir.

X Q. 224. Do you still persist that is a straight, parallel with the south wall?

A. As far as I can recollect, I did not notice anything different than it is a long bar, parallel with the south wall.

X Q. 225. You are sure it was not a horseshoe bar that comes way out from the center of the room?

A. I did not notice the roundness of the bar.

[fol. 111] X Q. 226. You were paying pretty close attention to the layout of the place and what was done there?

A. Not exactly, no, sir.

X Q. 227. Have you seen this man Tony since?

A. Yes, sir.

X Q. 228. Do you see him now?

A. Yes, sir.

X Q. 229. He is right in the court room, isn't he?

A. Yes, sir.

X Q. 230. He is right here in the court room, isn't he?

A. Yes, sir.

X Q. 231. Where is he?

A. Second row on the end, sitting facing the door.

Mr. Donnellan: Stand up.

(Person referred to stands up.)

The Witness: The small man, yes, sir.

X Q. 232. He was here this morning, wasn't he?

A. Yes, sir.

X Q. 233. And that is the man you say is the bartender?

A. That is the man that served us with the drinks.

X Q. 234. On all these occasions?

A. Yes, sir.

X Q. 235. Served you also on the fourth of June?

A. Yes, sir.

X Q. 236. And that is the man that put the money in his pockets?

A. Yes, sir.

X Q. 237. And made change from his pockets?

A. Yes, sir.

X Q. 238. And went upstairs?

A. Went upstairs for the liquor.

X Q. 239. And brought down the small vials?

A. Yes, sir.

X Q. 240. Which he passed to you?

A. That he poured into the glasses.

[fol. 112] X Q. 241. The last time you were there was on June 8th?

A. Yes, sir.

X Q. 242. And you had been there on June 7th?

A. Yes, sir.

X Q. 243. And on June 6th?

A. Yes, sir.

X Q. 244. And on June 5th?

A. Yes, sir.

X Q. 245. And on June 4th?

A. Yes, sir.

X Q. 246. How many samples of liquor have you brought to court from all those visits?

A. Two. One sample my own and the bottle that Mr. O'Connor brought.

X Q. 247. This is the bottle that Mr. O'Connor brought?

A. That Mr. O'Connor brought.

X Q. 248. That is Exhibit No. 2, and this is the other sample?

A. That is the sample that I brought.

X Q. 249. On what date?

A. On the seventh, the two bottles came the same day.

X Q. 250. You brought those on the seventh?

A. Yes, sir, delivered it here on the seventh.

X Q. 251. When did you buy it?

A. I bought—I think that was on the fifth, that liquor I got on the fifth, that is in that bottle.

X Q. 252. And on the fifth how many drinks did you buy?

A. I could not remember how many drinks.

X Q. 253. Did you deliver this yourself?

A. I delivered that to the office, yes, sir. I delivered it here.

X Q. 254. Or did you deliver it to Reilly?

A. I delivered it to Reilly and delivered it down here, both.

X Q. 255. Did you seal it before you gave it to Reilly?

A. Yes, sir.

X Q. 256. Did you put that seal on it?

A. No, sir.

X Q. 257. What seal did you put on it?

A. An ordinary sealing wax on top, no stamp.

[fol. 113] X Q. 258. Have you got some sealing wax with you now?

A. No, sir.

X Q. 259. You carried it along specially on this occasion?

A. No, sir.

X Q. 260. Did you put a seal ring on it?

A. No, sir.

X Q. 261. Do you know whether or not anybody has tampered with that bottle since you gave it to Reilly?

A. According to my idea that bottle was opened since I gave it to the Federal authorities.

X Q. 262. That is self-evident from the fact that the new seal is on it, isn't it?

A. Yes.

X Q. 263. How many drinks did you have on the fourth of June?

A. The fourth?

X Q. 264. Yes.

A. I could not remember now. To tell you the truth, I could not remember.

X Q. 265. Didn't you testify this morning that you had two or three?

A. Two or three, it was.

X Q. 266. You did not save a sample of that visit, did you?

A. No, sir.

X Q. 267. On the fifth how many did you have?

A. On the fifth I had about three or four.

X Q. 268. Three or four?

A. Yes.

X Q. 269. You only saved that quantity out of the three or four?

A. I did; I only could get that out.

X Q. 270. That is out of three or four drinks?

A. There is two drinks there.

X Q. 271. There is two drinks in this?

A. When I put it in it was supposed to have been two drinks.

X Q. 272. And you drank the other two?

A. I do.

X Q. 273. Are you very fond of whiskey?

A. No, sir.

X Q. 274. Now, wasn't it sufficient to get one drink on each occasion? Would not that be good enough as a sample?

A. I could not get the evidence out at that time by one drink.
[fol. 114] X Q. 275. That is the best answer you can make?

A. Yes.

X Q. 276. On the sixth how many drinks did you have?

A. Three or four.

X Q. 277. Three or four?

A. About three or four, I should say the average.

X Q. 278. And on the seventh you bought the pint?

A. No, sir, on the sixth the pint was bought.

X Q. 279. Of these three or four drinks you did not save any sample except the pint?

A. That is all.

X Q. 280. Did you taste some of the liquor from the pint?

A. No, sir.

X Q. 280. Did you taste some of the liquor from the pint?

A. No, sir, only the liquid, an amber colored liquid.

X Q. 282. You did not taste it?

A. No, sir.

X Q. 283. Did you turn it over to Reilly or did O'Connor?

A. O'Connor.

X Q. 284. Were you there with him?

A. Yes, sir.

X Q. 285. At the time he turned it over?

A. Yes, sir.

X Q. 286. Are you still working for Reilly now?

A. Yes, sir.

X Q. 287. And you have been working for him ever since?

A. Yes, sir.

X Q. 288. How often have you discussed this case with Mr. Leslie?

A. Never.

X Q. 289. Nor with Mr. Alden?

A. Never.

X Q. 290. Or with anybody in Leslie & Alden's office?

A. Never.

X Q. 291. How often have you been to the United States attorney's office about this case?

A. This case?

X Q. 292. Yes.

A. I was there twice.

X Q. 293. That is the time that you drew the affidavit?

A. Yes, sir.

[fol. 115] X Q. 294. And since then when?

A. A couple of weeks ago.

X Q. 295. Who did you see then?

A. Mr. Clark.

X Q. 296. Did Mr. Clark at that time get out your affidavit and read it to you?

A. No, sir.

X Q. 297. Have you seen your affidavit since the time you made it?

A. No, sir.

X Q. 298. And you have not seen your notes, either?

A. No, sir.

X Q. 299. Not even in Reilly's office?

A. No, sir.

X Q. 300. You are sure your notes are down in Reilly's office?

A. Yes, sir, as far as I know.

X Q. 301. And you never thought of bringing them to court?

A. No, sir, I was not ordered to.

X Q. 302. Did you make any memorandum in any memorandum book?

A. No, sir.

X Q. 303. When you came there on the eighth with Reager?

A. Yes, sir.

X Q. 304. Who did you have a conversation with?

A. In the place?

X Q. 305. Yes.

A. First I talked with the bartender.

X Q. 306. What?

A. Bartender Connor.

X Q. 307. With Bartender O'Connor?

A. Connor; not O'Connor.

X Q. 308. But on the seventh Connor had introduced you to Duignan?

A. We spoke to Duignan, yes, sir.

X Q. 309. And it was to Duignan that Connor said, on the seventh, that you are O. K.?

A. Yes, sir.

X Q. 310. And still you never got anything to drink from Duignan?

A. No, sir.

X Q. 311. And on the eighth you talked to the bartender?

A. Yes, sir.

X Q. 312. And Duignan was not there?

A. Yes, sir, he was at the end of the bar——

[fol. 116] X Q. 313. And you were in the back room?

A. As we entered the——

X Q. 314. Did you have a conversation with Duignan on the eighth of June?

A. No, sir.

X Q. 315. According to your testimony Connor had O. K'd. you to Duignan the day before?

A. On the seventh.

X Q. 316. And yet when you came back with Reager on the eighth you did not talk to Duignan at all?

A. No, sir, I did not.

X Q. 317. Is there a cigar counter in the barroom proper?

A. I could not remember.

X Q. 318. Is there a lunch counter there?

A. Yes, sir.

X Q. 319. A long lunch counter?

A. Well, it is not very long.

X Q. 320. Is that a straight counter or curved counter?

A. I could not remember if it is curved or straight, it is on the north side of the building.

X Q. 321. Your recollection as to everything that happened here is rather hazy except with regard to the sale of whiskey to you, isn't that so?

A. No, sir.

X Q. 322. It is very hazy as to the shape of the bar, isn't it?

A. That is something I cannot remember, whether it is a curve in the bar or not.

X Q. 323. And you cannot remember the shape of the lunch counter?

A. No, sir.

X Q. 324. But you can remember distinctly the sale of whiskey to you on June 4th, 5th, 6th, 7th and 8th?

A. Yes, sir.

X Q. 325. That is very distinct?

A. Yes, sir.

X Q. 326. That is the thing you were sent there for, to get Duignan for the sale of liquor, isn't it?

A. To see if we could get a drink, yes, sir.

[fol. 117] JOHN P. RYAN, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination.

By Mr. Clark:

Q. 1. You are employed in the chemist's office in this building?

A. Yes, sir.

Q. 2. Do you recall these samples here (indicating)?

A. Yes, sir.

Q. 3. Do you remember receiving those samples?

A. Yes, sir.

Q. 4. When did you receive them and from whom, if you recall?

A. On June 7th I received this sample from Private Detective Westing.

Q. 5. That is Exhibit No. 3?

A. Yes. On the same date I received this sample from Private Detective Westing.

Q. 6. That is Exhibit No. 2?

A. Yes. On June 9th Prohibition Agent Reager delivered that to me.

Q. 7. What did you do with them after you got them?

A. I stamped them, entered them in a book and passed them on to Mr. Quillan, the chief chemist.

Cross-examination.

By Mr. Donnellan:

Q. 8. You have a record of the receipt of these in your records upstairs, have you?

A. Yes, sir.

Q. 9. You do not know whether the contents of these bottles is liquor that was bought at Duignan's place at 42nd Street and Eighth Avenue, do you?

A. No, sir.

Q. 10. All you know is that on June 7th you received two samples from a man that you called a private detective?

A. Yes, sir.

Mr. Clark: I object to that, if your Honor please. He has not testified about that.

Mr. Donnellan: He testified that the detective delivered them. [fol. 118] The Court: Do not let us quibble over nothing.

Q. 11. You have a record of these in your books upstairs, the receipt of them, and who they came from?

A. Yes, sir.

JOSEPH W. QUILLAN, called as a witness on behalf of the plaintiff, having been duly sworn, testifies as follows:

Direct examination.

By Mr. Clark:

Q. 1. You are the United States Government chemist in this building?

A. I am.

Q. 2. Did you make an analysis of the liquor in these three samples here introduced in evidence?

A. I did.

Q. 3. Will you state what the analysis was of Exhibit 1, which I show you now?

A. This sample is distilled spirits commonly known as whiskey and has an alcoholic content of 44.9.

Q. 3. And Exhibit No. 2?

A. This is distilled spirits, commonly known as whiskey and has an alcoholic content of 49.5 per cent.

Q. 4. And Exhibit 3?

A. Distilled spirits commonly known as whiskey and has an alcoholic content of 47.5 per cent.

Q. 5. And those are the samples which your records show were taken in by Mr. Ryan who just testified here?

A. Yes, sir.

[fol. 119] Cross-examination.

By Mr. Donnellan:

X Q. 6. Let me see the record with the alcoholic content of exhibit marked 2, the pint bottle. Let me see the record for that.

A. (Witness hands counsel record.)

X Q. 7. You have these analysis, exhibit—this is not the same card, is it—

A. Laboratory numbers 27,817, 27,818 are on the same card.

X Q. 8. You got both those on the same date?

A. Yes, sir.

X Q. 9. Are these your seals on here?

A. Yes, sir.

X Q. 10. And you got those from what person?

A. Why, they were turned over to me by Mr. Ryan, the clerk, and he received them from Detective Westing.

X Q. 11. Where is there anything on here that shows that Mr. Ryan received those?

A. The number. He put down the laboratory number on there and he stamped the date on there.

X Q. 12. You could not tell whether that is his stamp any more than it is yours?

A. Well, he entered them in the record.

X Q. 13. You do not know whether he received them or you received them, do you?

A. I know he received them.

X Q. 14. Just because the entry in the ledger is in his handwriting?

A. Yes, sir.

X Q. 15. Have you a different entry from his?

A. Yes, sir.

X Q. 16. Whose handwriting is that?

A. That is mine, that is the result of the analysis.

[fol. 120] FRANK J. HALE, called as a witness on behalf of the plaintiff, having been duly sworn, testifies as follows:

Direct examination.

By Mr. Clark:

Q. 1. Mr. Hale, did you make a survey of the premises 657 Eighth Avenue?

A. I did.

Q. 2. What did you find? When did you make it and what did you find?

A. I made a survey of the premises 657 Eighth Avenue on July 6th, 1923, and found it to be a former licensed liquor saloon with a bar and old time fixtures. As I entered the barroom, I walked to the bartender and asked him his name and he said his name was Jack Degnan; he claimed to be in the saloon business on the premises for the past seven years. There were four men drinking beer at this time paying twenty-five cents a glass at the time I made this inspection.

Q. 3. What was done with the money?

A. It was rung up on the cash register in the back of the store.

Cross-examination.

By Mr. Donnellan:

X Q. 4. You could not see the amount that was rung up, Mr. Hale?

A. I did not see the amount; I seen it placed in the till, sir.

X Q. 5. What is that?

A. I seen it placed in the till.

X Q. 6. You say you saw four men drinking at the bar and they were paying twenty-five cents a glass?

A. Yes, sir.

X Q. 7. Did you get anything to drink?

A. No, sir, I did not ask for anything.

X Q. 8. You could see the amount rung up too, could you?

A. I did not see them ring it up, I saw them put it in the till, the [fol. 121] till was partly opened at the time.

X Q. 9. Did not you hear a bell ring?

A. No, sir, I did not.

X Q. 10. You were here this morning when Agent Westing testified, were you not?

A. No, sir, I was not.

X Q. 11. Did not they press any key on the cash register?

A. I was not there and I did not see anything of that sort at all.

X Q. 12. What kind of a bar is in this place?

A. It is a circular bar.

X Q. 13. A circular bar?

A. Sort of a circular bar.

X Q. 14. A great big horseshoe bar, is it not?

A. Yes, sir.

X Q. 15. So that it could not be confused with a straight bar that ran parallel with the wall of the building, would it?

A. To the best of my recollection, Mr. Donnellan, it is a circular bar.

X Q. 16. I mean, it is so circular that anybody could not describe it as being a bar parallel or straight with the side of the wall, could they?

A. Not very well.

Mr. Clark: I will ask the Court to take judicial notice of the fact that there have been two convictions here for selling liquor, Michael Smith on May 27, 1920, and Simon Pergone on March 31st, 1921; there have also been two final decrees entered pro confesso against this place, one on March 16th, 1921, and one on January 27th, 1923. I believe there was some controversy between the landlord and the tenant here and both the landlord and tenant have witnesses. I do [fol. 122] not know whether you want to hear the evidence now of the defendant or the landlord's testimony on his cross bill. The Government's case is in except for the evidence that preceded these other cases and there were cases in which it has been held that to be bound by the judgment.

Mr. Donnellan: I respectfully object, your Honor, to taking judicial notice of alleged convictions of men in these premises as not binding in any way on this defendant in the absence of proof showing that the defendants who pleaded guilty at that time sold the liquor of this defendant. It is in no way binding on this defendant, the conviction of somebody else, without there being proof that they sold it by reason of the instructions of this defendant or with his knowledge, privity or connivance.

The Court: I think that is correct.

Mr. Clark: If your Honor please, this man Smith who pled guilty was a co-defendant with Duignan in the first injunction suit in which an injunction and final decree was entered by default and the fact that there was a conviction in this case is, I think, in itself evidence.

The Court: Was Duignan served?

Mr. Clark: Duignan was served and Mr. Donnellan appeared for him. He was served and Smith was served and the decree ran against them.

Mr. Donnellan: What I am objecting to is that the District Attorney wants Duignan to be bound by alleged convictions of two other men in these premises.

The Court: All right, I will strike that out.

[fol. 123] Mr. Clark: I take an exception, if your Honor please. I take it it is sufficient against the premises for the Government's case; it may not be binding on the defendant but it is binding on the premises, the fact that the conviction is there.

The Court: I will strike it out.

Mr. Clark: I take an exception.

The Court: Have you some testimony, Mr. Leslie?

Mr. Leslie: Yes, sir. Do you want the landlord to put his testimony in now?

The Court: Yes.

Prima facie proofs closed.

OFFERS IN EVIDENCE

Mr. Leslie: I offer in evidence a deed from Hyman Vogel and Mathilda Vogel to the Pall Mall Realty Corporation, dated May 4, 1921, recorded in the register's office in the County of New York in Liber 3223, page 192, Block 1032, on May 5, 1921.

Marked Defendants' Exhibit A.

Mr. Leslie: I offer in evidence lease from Hyman Vogel to James Duignan, dated April 20th, 1916, which does not appear to be recorded, covering the premises in this action.

Marked Defendants' Exhibit B.

Mr. Leslie: I offer in evidence supplemental lease for a four-foot strip in said premises dated July 27th, 1916, between Hyman Vogel and James Duignan, the defendant in this action, which likewise appears to be unrecorded.

[fol. 124] Marked Defendants' Exhibit C.

Mr. Leslie: I offer in evidence decree pro confesso, dated January 3, 1923, between the United States of America and James Duignan and Claude Capponi, defendants, and entered and filed January 3, 1923, in the United States District Court.

Mr. Donnellan: I object to that as irrelevant, incompetent, and immaterial in this proceeding.

The Court: Let me see it. Was the default opened?

Mr. Clark: No.

The Court: It was not opened?

Mr. Clark: No.

The Court: And the service was had on Duignan?

Mr. Clark: Yes, and Mr. Donnellan appeared.

The Court: I will take it.

Mr. Donnellan: Your Honor admitted this decree?

The Court: I think so, if it appears that there was an appearance in the action and no move was made to open the default.

Mr. Donnellan: What is the date of that?

Mr. Leslie: January 3, 1923. The decree speaks for itself.

Marked Defendants' Exhibit D.

Mr. Leslie: I offer in evidence a notice of lien from the Police Department of the City of New York, dated April 7, 1922, to the Pall Mall Realty Company, charging the owner with conducting the premises for an illegal purpose and stating—

Mr. Donnellan: I object to this.

[fol. 125] The Court: I think that is proper, as far as the tenant is concerned or as far as the landlord is concerned. It does not necessarily bind you, the fact that the charge was made.

Mr. Leslie (continuing): Served April 10th, 1922, upon the landlord.

Marked Defendants' Exhibit E.

Mr. Leslie: I offer in evidence notice from the Police Department under date of April 25, 1922, again notifying the owner that the premises were being used for illegal purposes and charging that James Duignan was arrested.

Mr. Donnellan: I make the same motion as not binding in any way on the defendant.

The Court: It is not binding on the question of fact, it is material here for the purpose of showing the attitude of the landlord with respect to his action. I will take it.

Mr. Leslie: Charging him with selling three glasses of intoxicating liquor.

Marked Defendants' Exhibit F.

Mr. Leslie: I offer in evidence notice of the Pall Mall Realty Corporation to James Duignan, dated April 25, 1922, terminating the lease on said premises and served on the defendant, James Duignan—I do not think he will dispute the fact that it was served upon him. We have the witness here that served him.

The Court: Do you object to notice of the landlord to the tenant, Mr. Donnellan, which was just now offered?

Mr. Donnellan: I suppose he got a lot of them. Is that the only one?

Mr. Leslie: That is the only one at the present time.

Marked Defendants' Exhibit G.

[fol. 126] MICHAEL BARRY, called as a witness on behalf of the defendant Pall Mall Realty Corporation, being duly sworn, testifies as follows:

Direct examination.

By Mr. Leslie:

Q. 1. Mr. Barry, what is your occupation?

A. Federal prohibition agent.

Q. 2. Do you know the premises at 42nd Street——

Mr. Donnellan: If your Honor please, I make a formal objection to the attorney for the Pall Mall Realty Company calling a Government official. It strikes me that it is a rather unusual proceeding. This is some novel to my way of thinking, when we have the United States attorney calling private detectives, and the attorney for the landlord reciprocating by calling the Federal officers.

The Court: That does not render the testimony incompetent.

Mr. Donnellan: No, but it is a rather "Alphonse and Gaston" affair, it seems to me.

The Court: I will take it.

Q. 3. Are you acquainted with the premises 655-657 Eighth Avenue, 42nd Street, which is the subject of this action?

A. I am.

Q. 4. Did you, on March 24th, 1922, visit those premises?

A. I did.

Mr. Donnellan: If your Honor please, I object to these questions. They are wholly incompetent as coming from the landlord, who has no standing in the prosecution of this action except for the purpose of protecting his client.

[fol. 127] The Court: He has a right to come in and make an affirmative case. He is asking for affirmative relief.

Mr. Donnellan: I respectfully except to it.

Q. 5. What did you do there on that night?

A. At about eight-thirty P. M.——

Mr. Donnellan: What night?

A. (continued). March 24th, 1922, with Agent Jackers we executed a search warrant at Duignan's Hotel, 665 Eighth Avenue, and in Room No. 7, on the second floor, we found in a drawer of a dresser twenty-four two-ounce bottles of gin and three half pints of whiskey. In a closet two quart bottles and one five-gallon bottle and about two gallons of whiskey, and one pint of gin.

Q. 6. What did you do with that stuff?

A. Why, we brought that to the Knickerbocker warehouse.

Q. 7. Did you see anybody in those premises that night before you inspected the second floor?

A. Which part of the premises do you mean?

Q. 8. Downstairs; did you see anybody connected with the premises?

A. There was a man downstairs; one was Claude Capponi and the

other was James Donegan, they were standing at the lower end of the bar.

Q. 9. Did you have any conversation with either of them?

A. I asked Capponi for a key to Room No. 7—

Q. 10. Did he give it to you?

A. He claimed he did not have any key and he did not know where the key was.

Q. 11. How did you enter that room?

A. I forced the door open and forced open the drawer of the dresser and forced open the closet.

[fol. 128] Q. 12. What did you do with this alleged liquor that you seized that night?

A. Brought it to the Knickerbocker Warehouse.

Q. 13. Now, Federal Agent Jackers was with you at the time?

A. Yes, sir.

Q. 14. You say it was whiskey; did you taste any of it at that time?

A. Yes, sir.

Q. 15. And you know the taste of whiskey, of course?

A. Yes, sir.

Q. 16. And this was whiskey which you seized?

A. Yes, sir.

Cross-examination.

By Mr. Donnellan:

X Q. 17. You have been a Federal prohibition officer, how long, Mr. Barry?

A. About four years.

X Q. 18. Who made the affidavit on which this warrant that you executed was issued?

A. Two men by the name of Bosch and Lawson, as far as I understand.

X Q. 19. Bosch and Lawson?

A. Yes, sir.

X Q. 20. Were they Federal prohibition agents?

A. Not that I know of.

X Q. 21. Do you recollect what was in that affidavit?

A. No, sir, I do not.

X Q. 22. Don't you know that they were both private detectives working for the Pall Mall Realty Company?

A. At that time I did not. But afterwards I did.

X Q. 23. And did you find out since that Bosch was occupying Room 7?

A. No, sir.

X Q. 24. Did they recite Room 7 in their affidavit as the room in which the liquor was contained?

A. I believe they did.

[fol. 129] X Q. 25. Did you subsequently learn that they had had somebody put liquor in Room 7?

A. No, sir.

X Q. 26. You did not buy any liquor in the premises, did you?

A. No, sir.

X Q. 27. You did not see any liquor sold in the premises?

A. No, sir.

X Q. 28. And at the time that you went with the search warrant you were told to go to Room 7?

A. Yes, sir.

X Q. 29. By Bosch and this other man?

A. Lawson.

X Q. 30. And they are the men that you subsequently found out to be private detectives?

A. Yes, sir.

X Q. 31. And when you went to the premises you called on Tony?

A. Capponi.

X Q. 32. For the key to Room 7?

A. Yes, they pointed him out as the man who was supposed to have served the liquor there.

X Q. 33. What did Tony say?

A. He said he didn't have the key and he didn't know where the key was.

X Q. 34. Did you look at the register to see whether Room 7 was occupied or not?

A. Not at that time.

X Q. 35. And after Tony said to you that he did not have the key did he also tell you that the room was occupied?

A. He did.

X Q. 36. And then, not getting the key, you and your fellow agents broke open the door?

A. Yes, sir.

X Q. 37. Were these two private detectives with you at the time?

A. Yes, sir.

X Q. 38. Did they point out where Room 7 was?

A. They went upstairs with me and pointed out one room there.

X Q. 39. Did they tell you they had been occupying rooms in that hotel?

A. They did.

[fol. 130] X Q. 40. And also occupied 7?

A. No, he did not mention No. 7.

X Q. 41. Did they say they knew who had been in 7?

A. No, only Martin Capponi.

X Q. 42. You found no liquor in the barroom?

A. No, sir.

X Q. 43. And you searched the basement, I presume?

A. No, sir, we did not.

X Q. 44. You went just to this one room?

A. Room 7.

X Q. 45. And no other room?

A. No other room.

X Q. 46. How many rooms are there in that hotel?

A. I could not tell you.

X Q. 47. It is a hotel for men only, isn't it?

A. Yes, sir.

X Q. 48. What was in that room, in Room 7, besides the liquor you found?

A. There was a bedstead, bedding in it, a dresser and a closet and one chair.

X Q. 49. And a trunk?

A. I don't remember the trunk.

X Q. 50. Men's clothing?

A. I did not notice any clothing in there.

X Q. 51. Did you look in the closet to see whether or not any clothing was hanging up?

A. I did; there wasn't any clothing in the closet.

X Q. 52. Was there any in the dresser?

A. I didn't look, only in the top drawer. I broke open the top drawer.

X Q. 53. The dresser itself was locked?

A. Yes, sir.

X Q. 54. Did you say there was a trunk in the room or there was not?

A. I don't remember there being a trunk in the room.

X Q. 55. Was Mr. Duignan there at the time?

A. Not at the time I executed the search warrant, but when I came [fol. 131] back from the station house after having Capponi down there, Mr. Duignan was in the barroom at the lower end of the bar.

X Q. 56. Did you have a conversation there?

A. Agent Jacker was there in conversation with him at the time.

X Q. 57. You made an arrest by reason of the finding of this liquor, did you not?

A. I did.

X Q. 58. What was the outcome of that case?

A. I arrested James Duignan and Claude Capponi, and got a summons for Mr. Duignan to go to court the next morning.

X Q. 59. What happened?

A. The case against Duignan was dismissed and the case against Duignan and Capponi both were held.

X Q. 60. What happened in the case?

A. I don't know anything more about it.

X Q. 61. You have never been present any time when the case was tried?

A. No, sir.

X Q. 62. Did you look into any of the other rooms upstairs, Mr. Barry?

A. I did not go up past that second floor.

X Q. 63. Were you executing this search warrant as a Government agent?

A. Yes, sir, the search warrant was made out in my name.

X Q. 64. And it was directed merely to Room 7?

A. Yes, sir.

X Q. 65. That is, just that room and no other room?

A. That is all, so far as I can remember.

X Q. 66. Was the search warrant directed to you for execution?

A. Yes, sir.

Redirect examination.

By Mr. Leslie:

R. D. Q. 67. Now, Mr. Barry, I show you the affidavit upon [fol. 132] which the search warrant was issued, and ask you to tell the Court whether or not that affidavit sets forth that Room No. 7 was occupied by Bosch, or is it Room No. 42?

A. Assigned to Room 42.

Mr. Donnellan: May I see that affidavit now?

Mr. Leslie: I will give it to you.

R. D. Q. 68. That is all you know about it, Mr. Barry, isn't it?

A. That is all.

R. D. Q. 69. You had no talk with him or anything like that, did you?

A. No, I had no talk with anybody.

Mr. Donnellan: If your Honor please, I have a witness who has to get away. I am not through with Mr. Barry yet, but I would like to put this witness on, if that is agreeable.

The Court: All right.

Anson J. Riggs, called as a witness on behalf of the defendant Duignan, being duly sworn, testifies as follows:

Direct examination.

By Mr. Donnellan:

Q. 1. Mr. Riggs, what is your occupation?

A. Clothing. Brokaw Brothers, 42nd Street.

Q. 2. How long have you been employed by Brokaw Brothers?

A. About, anywhere from seventeen to twenty years.

Q. 3. And you are employed there now?

A. Yes, sir.

Q. 4. Do you know Mr. Duignan, the proprietor of Duignan's Hotel?

A. Only from going in there in that place; I don't know him but to talk to.

[fol. 133] Q. 5. You know the premises are on the southwest corner of Eighth Avenue and 42nd Street?

A. I do, I go there every day.

Q. 6. How often do you go in there?

A. Every day at noon.

Q. 7. Do you eat your lunch there?

A. Yes, sir.

Q. 8. And you have been going there for how long?

A. About seven or eight months.

Q. 9. During the time that you visited there have you ever seen liquor sold?

A. I have not.

Q. 10. And by liquor I mean whiskey?

A. I have not.

Q. 11. Have you ever purchased any liquor there?

A. No, sir.

Q. 12. Have you ever seen anybody use whiskey in that place?

A. No, I have not, not to my knowledge.

By Mr. Leslie:

Q. 13. What is that?

A. I have not seen any.

Cross-examination.

By Mr. Clark:

X Q. 14. How often do you go in there?

A. Every day.

X Q. 15. Every day?

A. Yes, sir.

X Q. 16. About what time?

A. One o'clock.

X Q. 17. How long do you stay there?

A. About one hour.

X Q. 18. Do you eat your lunch there?

A. Yes, sir.

X Q. 19. Did you ever ask for a drink?

A. No, sir.

X Q. 20. Where do you eat, at the lunch counter?

A. Yes, sir.

X Q. 21. You never go in the back room?

A. Yes, sir.

[fol. 134] X Q. 22. You see a waiter go in and out of the back room?

A. I see a man they call Tony come and ask and order food and take it in there.

X Q. 23. Haven't they some sort of a half of beer barrel or something like that at the rear end of the bar?

A. Not to my knowledge.

X Q. 24. You don't remember that?

A. No.

X Q. 25. Do you drink yourself?

A. No, sir. Well, I never buy it.

X Q. 26. You never buy it?

A. Once — a while, maybe three or four times a year.

X Q. 27. Did you ever talk to Mr. Duignan about buying liquor there?

A. No.

X Q. 28. About selling liquor?

A. No. I have talked to him about other things, but not about liquor. In fact, I have talked to him about building a house. I believe it was about building a house, that is the way I got acquainted with him.

CHARLES E. MOONERT, called as a witness on behalf of the defendant Duignan, being duly sworn, testifies as follows:

Direct examination.

By Mr. Donnellan:

Q. 1. Mr. Moonert, where do you reside?

A. Duignan's Hotel.

Q. 2. How long have you resided there?

A. About a year and a half.

Q. 3. And are you residing there now?

A. Yes, sir.

Q. 4. Do you have occasion to go into the cafe and restaurant on the ground floor?

A. I go through that when I leave my key in the key rack.

[fol. 135] Q. 5. Do you get in there once or twice a day?

A. Three and four times a day, sometimes.

Q. 6. During the time of your visits to the cafe on the ground floor have you ever seen any liquor sold there, and by "liquor" I mean beverage containing more than one-half of one per cent of alcohol by volume?

A. I have never seen any liquor sold there.

Q. 7. Have you ever seen whiskey there?

A. No, sir.

Q. 8. Have you ever seen others buy whiskey there?

A. No, sir.

Q. 9. Have you ever seen whiskey dispensed there?

A. No, sir.

Q. 10. Have you seen a man called Tony selling any whiskey there?

A. No, sir.

Cross-examination.

By Mr. Clark:

X Q. 11. Do you go in the back room?

A. I have to go to the back room the same as through the door to go up stairs.

X Q. 12. You never spent any time in the back room? You never sit down there?

A. Well, I never sit down, not that I know of, not to my recollection; I just pass by.

MICHAEL BARRY resumed.

Recross-examination.

By Mr. Donnellan:

R. X Q. 70. Mr. Barry, Mr. Leslie showed you this affidavit, did he not?

A. Yes, sir.

R. X Q. 71. And he stated that is the affidavit upon which the search warrant was issued, isn't that it?

A. Sir?

[fol. 136] R. X Q. 72. Is it the affidavit upon which your search warrant was issued?

A. That I could not say. I was just handed the search warrant. I executed the search warrant. I did not see the affidavit at all.

R. X Q. 73. He asked you to read that over after making the statement that that was the affidavit upon which the search warrant was issued to show that this man Bosch did not occupy Room 7, but occupied Room 42?

A. Yes, sir.

R. X Q. 74. And you answered that he occupied Room 42?

A. Yes, sir, but as to this affidavit——

R. X Q. 75. Now, look at the date of that affidavit. What is the date of that affidavit at the bottom that you find there, Mr. Barry?

A. 19th day of April, 1922.

R. X Q. 76. And what was the date of the execution of the search warrant?

A. March 20th, 1922.

R. X Q. 77. A month before the date of the affidavit?

A. According to that there.

Mr. Leslie: I may be mistaken with regard to the affidavit.

Mr. Clark: That is the date the preliminary injunction was obtained.

Mr. Leslie: It is the same thing.

R. X Q. 78. So that you don't know whether Bosch occupied Room 7 or 42 or any other room, do you?

A. No, he occupied a room there according to his own version, but I don't know the room.

R. X Q. 79. What was the name of the other private detective?

A. Lawson, as far as I can remember.

R. X Q. 80. Was it Westing?

A. No, Lawson.

R. X Q. 81. Did you see Westing when he was on the stand here?

A. I did.

[fol. 137] R. X Q. 82. Was he the party that was with you?

A. No, sir.

R. X Q. 83. What room did Lawson say he occupied?

A. I do not remember.

EDWARD G. JACKERS, called as a witness on behalf of the Pall Mall Realty Corporation, being duly sworn, testifies as follows:

Direct examination.

By Mr. Leslie:

Q. 1. Mr. Jackers, you are a Federal prohibition agent?

A. I am a general inspector.

Q. 2. Do you know the premises 655-657 Eighth Avenue?

A. I did.

Q. 3. At 42nd Street?

A. I do.

Q. 4. The premises in this action?

A. Yes, sir.

Q. 5. Did you ever visit those premises?

A. I did.

Q. 6. When?

A. I assisted Mr. Barry with the search warrant.

Q. 7. You were present that night?

A. I was.

Q. 8. When the seizure was made?

A. Yes, sir.

Q. 9. And have you a list of the stuff that was taken and seized that night?

A. I have.

Q. 10. Will you state to the Court what it was?

Mr. Donnellan: I respectfully submit, that he will corroborate Barry so far as the stuff that was taken is concerned.

Mr. Leslie: That is all I care to ask him, then.

The Court: All right.

[fol. 138] Cross-examination.

By Mr. Donnellan:

X Q. 11. Who accompanied you, besides you, on the evening of March 20th, 1922?

A. Bosch and Lawson.

X Q. 12. Who were they?

A. I do not know.

X Q. 13. They were not prohibition agents?

A. They were not.

X Q. 14. That you do know?

A. That I do know.

X Q. 15. Did you ever learn that they were private detectives working for the landlord of the building?

A. They were living in the building, they directed us to it.

X Q. 16. They told you they were working for the owner of the building?

A. No, working for the lawyers.

X Q. 17. What?

A. Working for a detective agency.

X Q. 18. Did they tell you what they were trying to get on Duignan?

A. I do not remember that any more.

X Q. 19. Did they tell you the owner was trying to break Duignan's lease?

A. Something to that effect.

X Q. 20. So they did tell you that?

A. Yes.

X Q. 21. Agent Barry testified that when he went there with the search warrant this warrant was directed only to Room 7?

A. Yes, sir, it was.

X Q. 22. And this Lawson and Bosch directed you to where Room 7 was, didn't they?

A. They did.

X Q. 23. Did they tell you they had a man living in Room 7?

A. No, sir, they did not.

X Q. 24. Duignan was not there at the time, was he?

A. He was not.

X Q. 25. Did you subsequently see Duignan that night?

A. I did. As we came out.

[fol. 139] X Q. 26. Did you have a conversation with him?

A. I did.

X Q. 27. What did he say?

A. He says he just came home from doing mission duty.

X Q. 28. Just came home from doing the mission?

A. Yes.

X Q. 29. What else did he say when you told him you found liquor in Room 7?

A. We told him we found the liquor in Room 7 and he said he didn't know who had that room, and he looked up his register.

X Q. 30. What did he say then?

A. He said he didn't know there was any liquor in that room.

X Q. 31. Did he say it was occupied by a guest?

A. Yes, sir.

X Q. 32. Did he disclaim ownership of that liquor?

A. He did.

X Q. 33. Did you see any liquor sold while you were there?

A. No, sir.

X Q. 34. You bought no liquor?

A. No, sir.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Leslie: That is the landlord's case.

Mr. Donnellan: Do the People rest?

Mr. Clark: Yes.

Mr. Leslie: With the exception that I would like to introduce the affidavit upon which the warrant was issued in place of this one which was made out on the same facts, but this was dated for the decree instead of the warrant.

Mr. Donnellan: If you say that is right——

Mr. Leslie: Do you want to concede that, and then we will not have to get the file.

Mr. Donnellan: Are you sure it is the same. I do not want to make a concession unless I am sure.

[fol. 140] Mr. Leslie: Mr. Cohen says it is. This is just clearing up an apparent discrepancy in the date; that is all.

Mr. Donnellan: Now, if your Honor please, I move to dismiss the bill of complaint and also the prayer for affirmative relief on the answer of the landlord upon the ground that the people have failed to make out a case, and more especially so that the evidence in the case in no way warrants the affirmative relief prayed for by the landlord. The evidence in the case, as far as I can see, exists only upon the testimony of Barry and Jackers and the testimony of two private detectives whose testimony, as a general rule of law, must be looked upon with great suspicion and scrutinized most carefully. As a matter of fact, the Court of Appeals has almost always barred testimony of that kind; that is what their decisions show. There is no evidence in the case, so far as the testimony of Barry and Jackers is concerned to connect Duignan in any way with any violation.

The Court: I will deny your motion, Mr. Donnellan.

Mr. Donnellan: I take an exception.

The Court: Mr. Reager has testified about a violation.

Mr. Donnellan: Yes, I forgot about that, but no arrests were made at that time. Maybe Mr. Leslie will concede what I intend to prove, namely, that a man named Herman Goldman acted as the attorney for the Pall Mall Realty Company in May, 1921, and also that Mr. Duignan instituted an action in the Supreme Court of this county [fol. 141] for the purpose of reforming his lease so as to permit the use of these premises for a place other than a cafe and restaurant business. I can subpoena the Court records to prove it, but perhaps he can concede it.

Mr. Leslie: I object to the introduction of that as irrelevant, incompetent and immaterial, and on the ground that it has nothing to do with this case. Even the tenant tried to reform his lease, the Supreme Court found that he could not review it, and notwithstanding that, he openly violates the law to such an extent that we are notified by the Police Department that our premises are being used for illegal purposes, and now he tries to create an atmosphere that he tried to do the right thing, and when the Court would not let him, then he continues to do the wrong thing, and it is incompetent here.

The Court: All the materiality that it possibly could have, as I see it, is whether or not the lease shall not be cancelled, and that is left to my discretion. I will sustain the objection.

Mr. Donnellan: May I have it on the record that the tenant intended to prove that the attorney for the landlord, Herman Goldman, refused permission to the defendant Duignan to assign the lease or sublet the premises or to rent the premises to the National Drug Stores Corporation, and also that the tenant intended to prove

that he had instituted an action in the Supreme Court in this county for the purpose of reforming the lease so as to use the premises for other than a cafe and restaurant business.

Mr. Leslie: And that the Supreme Court entered judgment refusing such reformation.

[fol. 142] Mr. Donnellan: Yes.

Mr. Leslie: Of course, this is all taken over my objection, as I understand it, your Honor.

The Court: He is making the tender of the proof, and I have sustained your objection.

Mr. Donnellan: I respectfully submit, in excepting to your Honor's ruling, that one of the most elementary rules of equity is that he who seeks equity must do equity. Here we have in this case this peculiar situation, according to the evidence which could be furnished by this tenant that he has been interfered with for the past three years on the attempt of the landlord to get rid of him, and he has endeavored to get rid of this bar and these fixtures and conduct in those premises something that would be open and above suspicion. The landlord constantly objected and prevented him doing that, and yet, while the landlord says you cannot run anything except a saloon, he now comes into court and tries to take advantage of his own wrong and I say that advisedly, and just for that reason we want possession of the premises. You cannot use the premises for the purposes for which they were rented and yet we will not give our consent to you to use the premises for some other purposes.

The Court: I would like to take it, as far as that is concerned, but it seems this provision of the statute is mandatory.

Mr. Leslie: Will your Honor indulge me for just one observation—

Mr. Donnellan: One moment, Mr. Leslie. I respectfully submit also, on this proposition of the admissibility of this evidence that if this provision of the National Prohibition Act shall be construed as [fol. 143] making it mandatory upon your Honor in this proceeding to cancel this lease, then this defendant is deprived of his property without due process of law and that section of the law is unconstitutional.

The Court: Go ahead with your proof.

Mr. Leslie: I just wanted to make one observation in answer to Mr. Donnellan: The landlord never prevented the tenant from running his place as a hotel, and there was no reason why he could not run this place as a restaurant, as he claims, without selling liquor and violating the law and making the premises liable to lien and fine. He has been repeatedly convicted of violating the law—

Mr. Donnellan: That statement is not true.

Mr. Leslie: In that Smith, one of his bartenders, pleaded guilty and was fined; another was adjudged guilty—

Mr. Donnellan: If your Honor please, I object to these statements going on the record, and I ask that they be stricken out. They are no proof.

The Court: They are not evidence.

Mr. Leslie: I am making this observation in answer to Mr. Donnellan.

Mr. Donnellan: I will state this, your Honor, in answer to Mr. Leslie, that he who comes into equity must do equity, and if this bar is objectionable to the landlord we will remove it. We had a perfectly good tenant in the National Drug Stores Company, and they would not give their consent—

Mr. Leslie: That is not evidence, either, if your Honor please.

The Court: Go ahead with your evidence.

[fol. 144] SIDNEY L. WARSAWER, called as a witness on behalf of the defendant, James Daighan, having been duly sworn, testified as follows:

Direct examination.

By Mr. Donnellan:

Q. 1. Mr. Warsawer, what is your line of business?

A. Real estate.

Q. 2. And how long have you been in the real estate business?

A. About eighteen years.

Q. 3. And where is your office?

A. 229 West Forty-second Street.

Q. 4. Are you familiar with real estate values in that neighborhood?

A. Yes, sir.

Q. 5. Your principal business is concerning property in that neighborhood, is it not?

A. Yes, sir.

Q. 6. You have sold property there and represented purchasers of property?

A. Yes, sir.

Q. 7. As a matter of fact, did you have anything to do with the premises at the southwest corner of Forty-second Street and Eighth Avenue?

A. Yes, sir.

Q. 8. What did you have to do with those premises?

Mr. Leslie: I object to that, if your Honor please, unless it relates to violations alleged in this bill of complaint. On the general proposition of his knowledge of the real estate I do not think it is material or relevant to this issue.

The Court: I do not think so either. I know there is a provision somewhere in the act which leaves the Court discretion as to whether the lease should be cancelled or not. What do you want to show by him?

Mr. Donnellan: I want to show that this leasehold for the balance [fol. 145] of the term is worth hundreds of thousands of dollars.

The Court: I will take it.

Mr. Clark: I object to this as against the Government.

The Court: I will take it on the controversy between the landlord and tenant as to the question of interest and motive.

Mr. Leslie: May I be permitted to state that I object to this testimony upon this ground, and upon the statement of counsel for the tenant that it is a very valuable leasehold? Assuming that it is a valuable leasehold, that should have made the tenant all the more punctilious in observing the law and I object to the introduction of the testimony on the ground that it is irrelevant and incompetent and has nothing to do with the issues.

The Court: I will take it.

Q. 9. What transactions did you have, so far as these premises are concerned, Mr. Warsawer?

A. I was the agent for the premises for a number of years.

Q. 10. Were you the broker in the transaction whereby Duignan took the lease of the premises?

A. I was.

Q. 11. You were instrumental in bringing about that lease?

Mr. Donnellan: Showing him a copy of the Duignan lease.

A. I will assume this is the lease that Duignan took, yes, sir.

Mr. Donnellan: The lease, as I understand, has been offered in evidence?

Mr. Leslie: Yes.

[fol. 146] Q. 12. In this lease the rental set forth, reading from the lease, is at the rate of \$12,500 per annum for the first two years, and at the rate of \$14,000 for the balance of the term. The term is nineteen years and eleven months from the 1st day of June, 1916, to the 30th day of April, 1936?

A. That is correct.

Q. 13. What would you say was the fair and reasonable rental value of these premises at the present time, Mr. Warsawer, judging from your experience as a real estate man in that neighborhood?

Mr. Leslie: That is objected to, if your Honor please.

The Court: I will take it and you have an exception.

A. The total rental value as of today is about \$39,000 a year.

Q. 14. That is at a rental value of almost \$20,000—over \$20,000 over and above the amount stipulated in the lease, is that so?

A. 24,400.

Q. 15. Then, this lease has until April 30th, 1936, to run?

A. Yes, sir.

Cross-examination.

By Mr. Leslie:

X Q. 16. What other properties in that neighborhood are you acquainted with?

A. I have the northwest corner of Forty-first Street and Eighth Avenue, right there, right on that block.

X Q. 17. It is the same size footage as this?

A. Yes; the same size, a little larger.

X Q. 18. Have you charge of any other real estate than this last one you mentioned in that neighborhood of the same size?

A. Yes, sir.

X Q. 19. Have you rented any of that property of that size for the [fol. 147] rental which you now say that the premises in question is worth?

A. Well, there are no other corners of Forty-second Street and Eighth Avenue.

X Q. 20. Have you rented any other property around that section for rents such as you say this property is now worth?

A. Well, the Forty-First Street corner.

X Q. 21. Yes, but any other?

A. Yes.

X Q. 22. Which one did you rent?

A. Forty-first Street and Eighth Avenue.

X Q. 23. Which corner?

A. The northwest.

X Q. 24. The northwest?

A. Yes, sir.

X Q. 25. How large a footage has that?

A. It is a subdivision, the entire footage is 25 by 80, and there is an "L" in the back of 20 by 100, and there is another adjoining plot 25 by 100.

X Q. 26. How much did you rent that for?

A. It averages about, between—

X Q. 27. Do not tell us what it averages?

A. We go by the front foot, Counsel. I have to give you the front footage, that is the way I figured this. That averaged about \$700 a front foot.

X Q. 28. How many front feet in this building here?

A. Twenty-five.

X Q. 29. And when did you rent that Forty-first Street and Eighth Avenue property?

A. About October 1st.

X Q. 30. For how long a term?

A. Eight years.

X Q. 31. Eight years?

A. Yes, sir.

X Q. 32. That is the only piece you have rented, is it not?

A. We have handled a lot of stuff on the avenue, there.

X Q. 33. That is the only piece you have rented, is it not?

A. Well, no; I would not say that. We are renting all the time. [fol. 148]

X Q. 34. You are renting all the time at this rate that you say this property is worth?

A. Not at this rate, no, sir.

By the Court:

Q. 35. What is the type of building upon the premises here in question?

A. It is a four-story building, a hotel upstairs, a three-story hotel. The downstairs portion is 25 by 53 and that consists of an "L" in back of that about 12 by 14, and the upper part consists of a three-story hotel, three stories above the grade floor that contains 53 rooms, three baths and six showers.

Q. 36. Assuming that this property as now constructed cannot, during the term of the lease, be changed or altered without the consent of the landlord, does it then have, in your judgment, the rental value to which you testified a moment ago?

A. No, sir, you would have to make an alteration of the store floor to adapt itself to whatever business would go in there; an alteration would have to be made downstairs on the grade floor, not in the hotel necessarily.

Q. 37. What is the rental value, in your judgment, of this property as it stands today with a provision in the lease that no alteration of the premises can be made without the consent of the landlord and assuming that the landlord will not give his consent to such alteration?

A. That would be a very hard question to answer, inasmuch as nobody would take a cafe today. I do not suppose there would be any rental value as of today.

Q. 38. Suppose a men's cafe was upon the premises and a hotel for men, what would be the rental value of this property, in your judgment?

A. Your hotel value, I can appraise at about \$16,500 a year. As I [fol. 149] value I can appraise at about \$16,500 a year. As I say, downstairs, unless—in its present condition, without the consent of the landlord to make an alteration—

Q. 39. There is no alteration to be made but a cafe can be conducted in the premises?

A. I could not answer that. I do not know as it would have any rental value at all. I do not know who would go in there.

EDGAR H. McLAIN, called as a witness on behalf of the defendant Duignan, having been duly sworn, testifies as follows:

Direct examination.

By Mr. Donnellan:

Q. 1. Mr. McLain, what is your occupation?

A. Hotel clerk.

Q. 2. And where are you employed?

A. Stanley Hotel, 124 West 47th Street.

Q. 3. That is between Sixth and Seventh Avenues, on the south side?

A. Yes, sir.

Q. 4. How long have you been employed there?

A. About five years.

Q. 5. Do you know Duignan's Hotel, located at the southwest corner of 42nd Street and 8th Avenue?

A. Yes, sir.

Q. 6. How do you come to know that building?

A. I live there.

Q. 7. How long have you lived there?

A. About six years.

Q. 8. Do you go in and out of there every day?

A. Yes, sir.

Q. 9. About how often?

A. Why, possibly three times a day.

[fol. 150] Q. 10. You pass in and out through the cafe on the ground floor?

A. Yes, sir.

Q. 11. And the rear room?

A. Yes, sir.

Q. 12. And have you ever purchased any intoxicating liquor there since prohibition?

A. No, sir.

Q. 13. Have you seen liquor dispensed there?

A. No, sir.

Q. 14. By liquor, I mean whiskey and strong drinks?

A. No, sir.

Q. 15. Have you seen anybody use whiskey or distilled spirits around there?

A. No, sir; I have not.

Q. 16. Did you ever hear of anybody buying any liquor containing more than one-half of one per cent of alcohol by volume, in that place since prohibition?

A. No, sir.

Q. 17. Every time you go to your room you pass through the rear room?

A. Not every time, but mostly.

Q. 18. Do you eat some meals there in the restaurant?

A. Yes, sir.

Q. 19. How often do you eat meals there?

A. Possibly two or three times a week.

Q. 20. And you have never seen any liquor sold there at all since prohibition?

A. No, sir.

Q. 21. Although you have lived there for five years?

A. Yes, sir.

Mr. Donnellan: I have some more that I may want to call tomorrow, if your Honor please. They could not wait; they are mostly working men and have to go away, but I will put Duignan on the stand now.

The Court: All right.

[fol. 151] JAMES DUIGNAN, called as a witness on behalf of the defendant tenant, being duly sworn, testifies as follows:

Direct examination.

By Mr. Donnellan:

Q. 1. Mr. Duignan, you are the lessee of the premises at the southwest corner of 42nd Street and Eighth Avenue, are you not?

A. Yes, sir.

Q. 2. And you occupy what portion of those premises?

A. I occupy the hotel, the whole corner.

Q. 3. And the store?

A. And the store and basement, the building complete.

Q. 4. You have a lease of those premises, have you not?

A. Yes, sir.

Q. 5. And that lease was executed to you by whom as landlord?

A. Hyman Vogel.

Q. 6. And what is the date of that lease, do you recollect?

A. 1916.

Q. 7. The 20th of April?

A. Yes, sir.

Q. 8. At the time you took that lease the sale of spirituous and intoxicating liquors was lawful?

A. Yes, sir.

Q. 9. Under the federal statutes and under the statutes of the State of New York?

A. Yes, sir.

Q. 10. What had been in those premises before you leased them?

A. It was a clothing store.

Q. 11. Known as Vogel Brothers?

A. Yes, sir.

Q. 12. And you rented out Vogel Brothers for the purpose of conducting a cafe?

A. Yes, sir.

Q. 13. And restaurant?

A. And a hotel.

Q. 14. How many rooms are there upstairs?

A. 53.

Q. 15. What is the floor space downstairs?

A. 25, approximately by 53; an "L" 12 by 14 in the rear.

Q. 16. And you had a liquor license under the laws of the State of New York?

A. Yes, sir.

[fol. 152] Q. 17. Up to the time that wartime prohibition came into effect?

A. Yes, sir.

Q. 18. Up to the time the constitutional amendment went into effect?

A. Yes, sir.

Q. 19. And you sold and dispensed liquors there?

A. Yes, sir.

Q. 20. How much did you spend in fitting out these premises at the time you rented them of Vogel?

Mr. Leslie: Wait a moment. On behalf of the landlord I object on the ground it is irrelevant and immaterial.

The Court: I will take it.

Mr. Leslie: Exception.

A. When I leased the place I had to put up \$5,000 as a deposit that the bills would be all paid there, as I got the lease for twenty years on condition that I change the building into a hotel from an old building; that building was an old tenement house, and I tore out the inside of that building and made a hotel out of it. I spent upstairs \$25,500 for remodeling upstairs. I spent \$13,000 downstairs. I paid rent from the first of June to the 11th of January before I opened the place. On the day that I opened that place at 42nd Street and Eighth Avenue it cost me \$62,500; that is including the furniture, linen and everything in the place.

Q. 21. You know that the property was purchased by the Pall Mall Realty Company of Hyman Vogel, do you not?

A. Yes, sir.

Q. 22. Did you have any conversation with the officers of the Pall Mall Realty Company after prohibition went into effect as to the use of the premises?

[fol. 153] Mr. Leslie: On behalf of the landlord I object to that as irrelevant, incompetent and immaterial.

The Court: I do not know what it is; I do not know what he is seeking to prove now. I will overrule the objection at this time until I see what it is.

Mr. Donnellan: I think, if your Honor please, that this testimony is relevant just for the very reason that Mr. Leslie says it is not relevant. It is relevant on this subject, that this defendant has expended this huge sum of money; it certainly would be to his interest not to lose that lease by permitting the sale of liquor to go on in the premises; that is the reason that I think the testimony is relevant.

The Court: Go ahead.

Mr. Leslie: Exception.

Q. 23. Did you have a conversation with any officer of the Pall Mall Realty Company after prohibition went into effect?

A. They didn't own the property at that time, but before that I had a prospective tenant, and finally I went and leased the place to the National Drug Company. I sent that lease to Hyman Vogel to get his consent. I don't know how long he kept the lease; he was trying to sell the property, I believe; I didn't know that until afterwards and he had the lease that I let out to the National Drug Store Company; that was made out, I think it is, on the back of that, in 1919, after prohibition. I can look at that. I am not positive. Maybe I have it myself. I have it here; I just cannot see without glasses. There it is on the back of that, the date.

Q. 24. November, 1919?

A. Yes, sir.

[fol. 154] Q. 25. And you sent that proposed lease——

A. To Hyman Vogel, and when Hyman Vogel sold the property he sent it to the Pall Mall Realty Company, and the Pall Mall Realty Company sent that back to me by their lawyer, Mr. Goldman, with a letter with it telling me they would not consent to the sub-lease, which is right here, that is the letter.

Mr. Donnellan: I offer that letter in evidence.

Mr. Leslie: I object to it.

Mr. Donnellan: It is a letter from Henry Goldman, the attorney for the Pall Mall Realty Corporation.

Mr. Leslie: I object to it upon the grounds stated before on the introduction of this evidence.

The Court: Objection sustained.

Mr. Donnellan: Exception.

Q. 26. You had a conversation with one of the officers of the Pall Mall Realty Corporation, did you not?

A. Yes, sir, Mr. Polognow here (indicating).

Q. 27. Mr. Polognow?

A. Yes, sir.

Q. 28. What office does he hold in the Pall Mall Realty Corporation?

A. I cannot really say what officer he is, I think, as I understand, he is vice president.

Q. 29. What conversation did you have with him and when?

A. I know him for about ten or twelve years.

Q. 30. What conversation did you have with him?

A. I asked him to let me put in some other business in the place. He said, "No, we will get much more money for the corner." I says, "Well, I got the lease," and he says, "Yes, you got the lease but [fol. 155] you got a cheap lease," and I says, "But I spent a lot of money on this place and you are depriving me from renting this place to the National Drug Stores Company," and he says, "We won't let you sublet it." Then I made an appointment to go down to the Pall Mall Realty Company, and asked them to let me put some other business in, and they refused unless I paid an exorbitant rent.

Q. 31. What rent did they ask you?

A. They did not mention, they just said I would have to pay an exorbitant rent; they didn't say what it would be.

By Mr. Leslie:

Q. 32. Who said that?

A. There were eight or nine of them when I went into the place, I don't know who they were.

By Mr. Donnellan:

Q. 33. Did you institute an action in the Supreme Court to get a construction of your lease?

A. Yes, sir.

Mr. Leslie: May I preserve my record? I move to strike out this testimony.

The Court: I will deny the motion to strike out the testimony that the officer of the Pall Mall Realty Corporation——

Mr. Leslie: He has not named the officer.

The Court: Yes, he has.

Mr. Leslie: You mean Mr. Polognow?

The Court: Yes.

Mr. Leslie: I do not move to strike that out. I move to strike out the rest of his testimony that relates to the big amount of rent and so forth.

[fol. 156] The Court: Yes; he will have to identify those men.

Q. 34. Who was present, was Mr. Polognow present?

A. To the best of my information there were seven or eight of them sitting at a table.

By the Court:

Q. 35. Who were they?

A. I don't know.

By Mr. Donnellan:

Q. 36. Was he there?

A. I saw him afterwards when they told me about the rent. I met him, and he said, "How did you come out?" and I said, "Them people don't want to let me do nothing with the corner."

Mr. Leslie: I move to strike out what took place not in the presence of Mr. Polognow.

The Court: Unless he can identify these people, yes.

Q. 37. Did you tell Mr. Polognow what the conversation was that you had with these seven or eight people in the office of the Pall Mall Realty Corporation? Did you tell him?

A. I met him outside and I said, "These people don't want to let me rent the place or put a different business in the place unless I pay an exorbitant rent." Then I asked him would he intercede for me, and he says, "If you had the corner you would do the same thing yourself."

Q. 38. Not give the consent to sublease or assign the lease?

A. Yes.

The Court: Strike out all the conversation he had with these unidentified parties.

Mr. Donnellan: He says he repeated it to Mr. Polognow.

[fol. 157] The Court: I said the conversation with the identified man may stand but the other conversation is stricken out.

Q. 39. You then had a conversation with Mr. Polognow in regard to altering the fixtures so as to make a cafeteria in the premises?

A. Yes, sir.

Q. 40. When did you have that conversation?

A. Shortly after that I said, "I want to put a cafeteria in here."

Q. 41. Did you tell him you wanted to rip out the old bar fixtures?

A. Yes, sir, I told him I wanted to rip out the old bar fixtures and change it into a cafeteria, and he said, "We won't let you do anything with it."

Q. 42. What did he tell you your clause in the lease was?

A. That it was for a hotel and restaurant and I can't make any alterations without the written consent which is called for in the lease.

Q. 43. Not without the written consent called for in the lease?

A. No.

Q. 44. Did you ask him to give a written consent of the Realty Company for the alterations?

A. Yes, sir.

Q. 45. What did he say?

A. He wouldn't do it.

Q. 46. Now, Mr. Duignan, how is this floor fitted out, the ground floor?

A. The ground floor is fitted out for a cafe and a lunch counter.

Q. 47. You conduct a lunch counter, do you?

A. I have a thirty-foot lunch counter, I think the lunch counter is thirty foot.

Q. 48. What size bar have you in that place?

A. The bar is a horseshoe bar, half horseshoe; it runs around this way (indicating).

Q. 48. And that practically takes in the entire center of the store?

A. Yes, the entire center of the store.

[fol. 158] Q. 49. How far out from the wall does the horseshoe bar go?

A. I would say, to the best of my opinion, fifteen feet.

Q. 50. Nobody could mistake it for a straight bar?

A. Nobody walking in the bar would have to look and see what kind of a bar it is; there is no other place like it.

By the Court:

Q. 51. Where is the lunch counter?

A. On the one side.

Q. 52. Which side?

A. The north side.

By Mr. Donnellan:

Q. 53. And the bar is on the south side, this big horseshoe bar?

A. The barroom space is 25 feet front by 40, and I have what they call a horseshoe bar, a half horseshoe, and that measures 43 feet around each end of the bar is 9 feet, it is in front 9 feet at the front window and 9 feet from the back at the end where we have also a room where there is a safe and a register for the 53 rooms upstairs.

Q. 54. That is——

A. Eighteen feet.

Q. 55. Taken from the forty-two feet?

A. No, there is nine feet at both ends of the bar.

Q. 56. Straight?

A. Straight.

Q. 57. With the wall?

A. At the end of the bar and at the front of the bar with the horseshoe is forty-three feet long.

Q. 58. How deep is the store, did you say?

A. The store is about twenty-five by forty, that is, leading into the sitting room.

Q. 59. That is forty feet running west?

A. Yes.

Q. 60. When you deduct eighteen from the forty that leaves twenty-four?

A. Yes.

[fol. 159] Q. 61. And that is the diameter of the bar?

A. The bar measures forty-three feet out in the barroom; it is a horseshoe, anybody can see it.

Q. 62. How far is the bar part of the horseshoe, is it as far as from where I stand from you?

A. Not that far.

Q. 63. About that far (indicating)?

A. A little farther, about from where you are from the bar.

Q. 64. That is how far it is from the wall (indicating)?

A. Yes.

Q. 65. But the straight bar, the straight part of the bar, is how many feet from the wall?

A. It is not straight, it is crooked, a horseshoe.

Q. 66. You say there are two nine-foot straight ends?

A. The bar runs around like that (indicating), and turns in—

Q. 67. Can you draw a diagram of this bar?

A. Yes, sir.

By the Court:

Q. 68. You mean that is the type of bar you have there (indicating)?

A. Something like that. You see, that is the crossing path and that is the end (indicating).

Q. 69. Just draw a picture of your bar on that?

A. The bar comes around like that (indicating) we will say. That is the window just like that (indicating), and out like that; in this space from here to here is forty feet, the whole space complete, that is the end of the bar there, and right to the window is nine feet and this is nine feet (indicating) and this is a half crescent horseshoe we have. That bar is forty-three feet. It measures forty-three feet exactly around that way (indicating) and the whole space here, the [fol. 160] bar is only forty feet and we have nine feet here and nine feet here (indicating). I put a half circular bar in that place.

By Mr. Donnellan:

Q. 70. So that the measurement of the curved part of the bar alone is 36 feet longer than the whole width of the room?

A. Yes, thirty-six.

Q. 71. So that it is curved out a considerable extent?

A. It has to, to give that space.

Q. 72. Nobody could possibly enter those premises without seeing that?

A. Nobody in the world.

Mr. Leslie: I object to that and move to strike it out.

The Court: Yes, strike it out.

Q. 73. Now, Mr. Duignan, you sat here in court since this trial started last Friday?

A. Yes, sir.

Q. 74. You saw Agent Reager testify, did you not?

A. Yes, sir.

Q. 75. He testified that he was there on June 8th with what he called an unknown man, but who was afterwards disclosed as having been a private detective named Westing, whom you also saw?

A. Yes, sir.

Q. 76. Did you ever see either one of those men in your premises?

A. Never in my life.

Q. 77. You positively swear to that?

A. Positive, that I never saw any one of them in my life until I saw them here.

Q. 78. You know you are under oath in this case?

A. Certainly.

Mr. Leslie: I object to that and move to strike it out.

The Court: Yes.

[fol. 161] Q. 79. Did you ever sell Westings any liquor?

A. Never.

Q. 80. Did you ever have any conversation with a man named O'Connor to the effect that Westings was all right?

A. I never saw either of them until I saw them here, in my life.

Q. 81. You heard Agent O'Connor testify?

A. Yes, sir.

Q. 82. You heard him testify that he came there seventeen or eighteen — between the 24th of April and the 25th or 26th of May?

A. Yes, sir.

Q. 83. You heard him testify that he asked you on a couple of those occasions for a drink of whiskey?

A. I never met the man and he never asked me; I never met him in my life.

Q. 84. He never told you that he was not feeling very good and was out late the night before?

A. Never.

Q. 85. Did you ever sell him any whiskey?

A. Never. I never saw him until I saw him here.

Q. 86. Did you ever tell a man named Tony who works for you there to get him any whiskey?

A. Never in my life.

Q. 87. Do you know that a man named Tony had sold any whiskey?

A. Never.

Q. 88. As I recollect it, O'Connor testified that he talked to you one day as you were sitting in the bar-room in your shirt sleeves in the month of June?

A. I never saw the man until I saw him here.

Q. 89. You are around there every day, are you not?

A. Yes, sir, every day.

Q. 90. In the ordinary course of events you would have recalled a man who was in your place seventeen or eighteen days in succession, wouldn't you?

A. Positively I would.

[fol. 162] Q. 91. You know that the Pall Mall Realty Company has had private detectives living in your hotel, don't you?

A. Yes.

Mr. Leslie: I object to that, if your Honor please—I withdraw the objection.

Q. 92. How do you know that?

A. How do I know it? Because they were living there in my place, and they got a warrant out and arrested one of my men, the lunch man.

Q. 93. Who was that?

A. Tony.

Q. 94. You heard then that these men who had been living there were private detectives?

A. I did not know it until then.

Q. 95. That was a man named Bosch, was he not?

A. Yes, sir.

Q. 96. Did you ever serve Bosch with any liquor?

A. I didn't know him, and he lived there for four weeks. And a man can live there for four weeks and we not see him, because he can go out of the hotel and we cannot see him, and he can come in and go out and I would not see him.

Mr. Leslie: I move to strike that out.

The Court: Yes.

Q. 97. Did you hear that night that Agent Barry was there that Lawson had been living there and that he was a private detective?

A. That night I did, yes.

Q. 98. Did you ever have any conversation with Mr. Polognow about the planting of private detectives—

A. In fact, I did not look at him because I knew he was framing me up.

Mr. Leslie: Now—

The Court: Strike that out.

[fol. 163] Q. 99. Did you ever tell him he was trying to frame you up?

Mr. Leslie: I object to that question.

The Court: Yes. I do not think that is material.

Q. 100. Did you ever see any men sitting at tables in the rear room drinking whiskey?

A. Never, not since Prohibition went into effect.

Q. 101. Did you ever see this man Tony serve any whiskey in small bottles out of his pocket?

A. Never, and he never did, either.

Mr. Leslie: I move to strike that out.

The Court: Yes.

Q. 102. So far as you know, he never did?

A. So far as I know, he never did.

Q. 103. Did you ever see Tony make change after he served whiskey in the rear room, out of his pocket?

A. No, sir.

Q. 104. What is Tony's occupation?

A. Tony, when he takes meals he pays for them at the desk; when he takes them in and he has to collect the money in the back room.

Mr. Leslie: I move to strike that out.

The Court: No.

Q. 105. Is Tony a bartender?

A. No, a lunch man and he tends to renting rooms, too; he goes behind the bar occasionally, too.

Q. 106. Where is your key rack?

A. At the end of the bar.

Q. 107. Now, Agent Jackers said that on the night of March 24, when they executed the search warrant, that you came into the [fol. 164] place—after they claimed to have found liquor in Room No. 7 you came into the place?

A. I came in about half-past ten.

Q. 108. Did you own any liquor found in Room 7?

A. Never.

Q. 109. Did you ever have any liquor there?

A. No, sir.

Q. 110. What conversation did you have with Jackers when you came in?

A. Why, when I walked in the front this Jackers was standing at the bar and another man was standing at the bar, and he said, "They are raiding the place." And I walked in and I said, "What was that?" And he said, "We got in Room 7 and we found some whiskey there," and I said, "I don't know anything about it," and I went up to see the room and they had broken the door and the bureaus and the closet.

Q. 111. And you had just come from the Mission at that time?

A. Yes, sir.

Q. 112. So that you would be more particular about telling the truth?

A. Yes, sir.

Mr. Leslie: I move to strike that out. Missions have no impressions on some people.

Q. 113. How much of a mortgage did the brewery have on the fixtures at that place before you opened it?

Mr. Leslie: I object to that.

The Court: I will take it.

A. At that time they had none.

Q. 114. Did you subsequently borrow some money from the brewery?

A. I borrowed \$10,000 from the brewery afterwards.

Mr. Leslie: I object to all this.

Overruled: Exception.

[fol. 165] Q. 115. You were sued also by the Pall Mall Realty Company in a summary proceeding in the Third District Municipal Court of this city, were you not?

A. Yes, sir.

Q. 116. And you put in your answer in that case, did you not?

A. Yes, sir.

Q. 117. And you appeared in court on several occasions ready to try it?

A. Several times.

Q. 118. Do you know what happened to that case?

Mr. Clark: I object to that.

A. I forget what was done. They did not get a jury, or something like that.

Mr. Donnellan: Perhaps Mr. Leslie will concede that they discontinued that action.

Mr. Leslie: The landlord will say this, that when they were satisfied that they could not get a jury who, even when Mr. Duignan violated the law, would render a verdict against him, we had to discontinue it.

Q. 119. One of these agents—I think it was Mr. Reager—testified that on the occasion of his visit there that he could see a man ringing up on the cash register from the back room, sitting at a table in the back room. Describe the layout of your premises, so far as the back room is concerned.

Mr. Leslie: I object to that. Mr. Reager testified to no such thing.

The Court: I believe he testified that he could not see the cash register.

Mr. Donnellan: Pardon me. I know one testified that Tony put the money in his pocket and somebody else said he saw it rung up on the cash register.

[fol. 166] The Court: Somebody said he heard the cash register ring when he went out.

Mr. Clark: I believe Mr. Reager said he got up and watched him and gave the excuse that he was going to the toilet to watch him.

A. We ring up all the meals on the register behind bar.

By the Court:

Q. 120. Don't you ring up the drinks?

A. The soft drinks.

By Mr. Donnellan:

Q. 121. Tell us where this register is, Mr. Duignan, in that bar-room?

A. There is one register at the end of the bar; you could not see that; and there is another register, the one we use for the room and for the restaurant, and the one for the drinks we serve across the bar.

Q. 122. Where is the one used for the drinks across the bar?

A. In the center.

Q. 123. Inside this big oval space?

A. Yes, sir.

Q. 124. And anybody standing around could see——

A. You would have to go down the front to see it; you could not see anything rung on the register.

Q. 125. But you do not keep the numbers covered, do you?

A. No, never cover any of them.

Cross-examination.

By Mr. Clark:

X Q. 126. Mr. Duignan, in your place there you say that is 25 feet across, isn't it?

A. Twenty-five feet.

X Q. 127. Is that the inside measurement or the outside?

A. I think it is twenty-five feet four.

[fol. 167] Mr. Donnellan: That is the north and south measurement.

X Q. 128. The bar runs east and west, isn't that right?

A. That is right.

X Q. 129. On the side opposite the door you have another counter, have you not?

A. Yes, a little lunch counter.

X Q. 130. How far does that stick out?

A. That sticks out very little. You can hardly pass going behind it, because we have to have the measurement there.

X Q. 131. How many feet?

A. The lunch counter, I really could not say exactly; it must be——

X Q. 132. About four feet?

A. Around that, four feet.

X Q. 133. It is a narrow counter?

A. Yes—not so very narrow.

X Q. 134. About a foot wide?

A. Yes, about that.

X Q. 135. And about three feet behind it?

A. About that.

X Q. 136. That this bar on the other side starts nine feet from the front of the store: is that right?

A. About nine feet from the front on this side (indicating).

X Q. 137. Then extends to a space nine feet from the back?

A. Nine feet exactly.

X Q. 138. How far is it in a straight line from this end to that end (indicating)?

A. It is not a straight line.

X Q. 139. How far is it in a straight line?

A. In a straight line it would be about—

X Q. 140. Twenty-two feet, wouldn't it?

A. I could not say exactly, but around that or a little longer, twenty-two or maybe twenty-one feet, around that.

[fol. 168] X Q. 141. Then, how far is there between the front and the middle of the bar and this lunch counter?

A. How far is the sides?

X Q. 142. Yes.

A. The sides would be about—maybe five feet, maybe a little more. I don't know exactly what it is.

X Q. 143. You said the bar only stuck out about ten feet; is that right?

A. I think it is more than that, more than ten feet.

X Q. 144. It is about like that, just as you have drawn it (indicating)?

A. That is the way; it is right around that way (indicating).

X Q. 145. It is not any wider than that?

A. Excuse me a minute. As you see it, it ends here (indicating), that space is open there (indicating).

X Q. 146. For the barkeeper to get in?

A. And that is closed around like a hoop, like that, all around it (indicating).

Mr. Clark: I will offer that drawing in evidence.

Marked Plaintiff's Exhibit No. 4.

X Q. 147. Mr. Duignan, you have been arrested a number of times, have you not?

A. Have I been arrested a number of times?

X Q. 148. Yes.

A. In the liquor business, is it?

X Q. 149. Yes.

A. Once.

X Q. 150. When was that?

A. It is inside, around a year, maybe, or so.

X Q. 151. You were arrested in September, 1920, were you not?

A. Not me.

X Q. 152. Are you Mr. James Duignan?

A. I was subpoenaed.

X Q. 153. Are you James Duignan?

A. Yes, sir.

X Q. 154. Did you have a brother Frank?

A. No, a son Frank.

[fol. 169] X Q. 155. A son Frank?

A. Yes, sir.

X Q. 156. The two of you were arrested and under bail, were you not?

A. We were not.

X Q. 157. In 1920?

A. We were not arrested; we were subpoenaed.

X Q. 158. Did not you have to put up a bail bond?

A. Yes, but we were subpoenaed.

X Q. 159. And you put a bail for your son, too, didn't you?

A. I guess so. If your record is there I must have.

X Q. 160. You had a man named Michael Smith working for you?

A. Yes, sir.

X Q. 161. And he was arrested?

A. Yes, sir.

X Q. 162. And he pleaded guilty?

A. Yes, sir.

X Q. 163. And you paid his fine?

A. No, sir.

X Q. 164. Are you sure you did not?

A. Positive.

X Q. 165. Did you furnish bail for him?

A. I am not so sure; he worked for me a good while. I am not sure about his bail. I am not sure whether I did or not.

X Q. 166. He was a good man?

A. He was with me for years, three years or more.

X Q. 167. When was it that he was arrested; do you recall?

A. I haven't got the date.

X Q. 168. Some time—

Mr. Donellan: Give it to him, Major.

X Q. 169. That was in 1920?

A. I suppose so.

X Q. 170. You kept him after that?

A. No, sir; I discharged him.

X Q. 171. As soon as he pleaded guilty?

A. As soon as he pleaded guilty I discharged him.

X Q. 172. Who is Paul Paponi?

A. Mr. Paponi, he worked for me three or four years, three years [fol. 170] at least, and then I had him on as a clerk at night, a hotel clerk.

X Q. 173. Like Tony?

A. The same thing like Tony.

X Q. 174. And he also pleaded guilty, didn't he?

A. Yes, he pleaded guilty and went to jail, too, he sold his own stuff.

X Q. 175. You did not go to jail for him?

A. No, I didn't. I discharged him then.

X Q. 176. He was not very much good to you in jail, was he?

A. No, he was in jail for five days, I believe.

X Q. 177. You went on his bail, didn't you?

A. No, sir; never one cent; never see him at the court after he was arrested.

X Q. 178. On two separate occasions actions were brought against you for injunctions, against you, isn't that right?

A. I guess so.

X Q. 179. One was against you and Michael Smith?

A. I suppose so. I forget what it was. Mr. Donnellan would know that.

X Q. 180. Mr. Donnellan represented you in that action?

A. Yes, sir.

X Q. 181. And a second one was brought against you and Claude Capponi?

A. Yes, sir.

X Q. 182. And Claude Capponi is Tony, isn't he?

A. Tony they call him, that is all.

X Q. 183. His name is Claude Capponi?

A. That is right.

X Q. 184. You yourself were arrested by Michael Barry and Mr. Jackers?

A. I was subpoenaed.

X Q. 185. You were only subpoenaed?

A. That is all.

X Q. 186. Claude Capponi is out on bail now, isn't he?

A. Yes, sir.

X Q. 187. What?

A. I guess so. Yes, sir; he is.

[fol. 171] X Q. 188. And you furnished bail for him?

A. I am not sure. I don't think so. You have the record of it there. I don't think so, but he is working for me yet, he is here, he can tell you.

X Q. 189. How long have you been in the saloon business, Mr. Duignan?

A. Twenty-four years, I think.

X Q. 190. That is most of your life, isn't that right?

A. Most of it.

X Q. 191. Where did you learn the business?

A. In Dublin, Ireland.

X Q. 192. And you have been a saloon keeper ever since you have been in this country?

A. I was in this country seven or eight years or more before I was a saloon keeper.

X Q. 193. That is, before you ran your own saloon?

A. Yes, sir.

X Q. 194. You were then a bartender?

A. I used to be a waiter.

X Q. 195. In a saloon?

A. In a restaurant, O'Neill's, 22nd Street and Sixth Avenue.

X Q. 196. You have never known any other business except—

A. Hotel.

X Q. 197. Waiter or saloon keeper?

A. And restaurant, that is right.

X Q. 198. Who did occupy this Room No. 7, where all this liquor was found?

A. I don't know who occupied it. I don't know who occupied it. It looked as if a man by the name of Jensen was in it. I think the federal agent had the record of it. You see, in my hotel you can go upstairs and downstairs, and can go upstairs and downstairs without seeing, the way the place is laid out. You can go out of the hotel and a fellow will see you. We cannot see in the sitting room, and a [fol. 172] man going downstairs, it is laid out that way in order to get the space in there as much as we could.

X Q. 199. How many people have you in the premises there?

A. We have 53 rooms, but a lot of fellows takes two in a room.

X Q. 200. How many people do you average a night?

A. We average about 30 a night now.

X Q. 201. How many meals do you serve?

A. I could not state the exact amount, 80 to 100, around that.

X Q. 202. 80 to 100 a day?

A. That is all, yes.

X Q. 203. What are they, lunches?

A. Lunches.

X Q. 204. Sandwiches?

A. Everything. You can get a meal—

X Q. 205. What kind of sandwiches?

A. We have—

By the Court:

X Q. 206. Do you serve steaks?

A. No steaks, only lunch.

By Mr. Clark:

X Q. 207. You do not serve cooked food?

A. That is all cooked.

X Q. 208. You do not serve steaks?

A. No.

X Q. 209. What do you serve, ham and eggs?

A. Ham and eggs, corn beef and eggs, pork, lamb stew, goulashes, everything of that kind.

X Q. 210. Just boiled food?

A. Yes; we will give you a steak if you want it.

X Q. 211. Where do you serve all this, out in front or in back?

A. In front and in back, both places.

X Q. 212. You have not got much room in front?

A. We have, I think it is twelve stools.

X Q. 213. Twelve stools by the bar?

A. Yes.

X Q. 214. By this little counter?

A. Yes.

[fol. 173] X Q. 215. And have you any tables in front?

A. One.

X Q. 216. In the back room you have not much space there, have you?

A. Oh, yes; we have a good sized place there. I think we have fourteen, fifteen tables.

X Q. 217. Have you only got fifteen?

A. We have fifteen feet——

X Q. 218. Fifteen feet?

A. Thirteen feet and then we got an L twelve by fourteen.

X Q. 219. And that is all in your back room?

A. Yes, sir.

X Q. 220. How many tables there, ten or twelve?

A. I am sure there are about twelve.

X Q. 221. Small tables, are they?

A. This sized table (indicating).

X Q. 222. The ordinary table you have in the back room of a saloon?

A. Well, mahogany tables, yes.

X Q. 223. This stairway that runs out of that room goes upstairs, does it?

A. When you come in from the street there is another door in between and you can go up that way to the rooms.

X Q. 224. You would not say Claude Capponi never went up and down those stairs?

A. Certainly, hundreds of times a day.

X Q. 225. All the time?

A. He goes up and gets orders and serves the people, and when he gets an order he gets in the barroom and he gives it to the people.

X Q. 226. And he goes downstairs to bring that up?

A. He is always downstairs and goes up.

X Q. 227. Who is Connor?

A. We have a man working there now by the name of Connor.

X Q. 228. Who is he; is he over Tony?

A. He is the bartender and Tony is the lunch man and waiter.

[fol. 174] X Q. 299. Tony is the one that carries those things around from the barroom to the back room?

A. Yes, that is right.

X Q. 230. And Connor tells him what to do?

A. He was working there long before Connor ever came.

X Q. 231. But Connor is not a waiter?

A. No, he is behind the bar.

X Q. 232. He is the cashier?

A. Cashier, rents rooms, the same as Tony does.

X Q. 233. He gives Tony orders?

A. There is nobody gives orders there except me.

X Q. 234. Nobody but you?

A. Not that I know of, except the way they give between one another.

X Q. 235. Suppose a man in the back room wanted a drink; Tony would get the order and go to Connor?

A. That is right.

X Q. 236. Connor would give it to Tony and Tony would take it to the back room, isn't that right?

A. That is right.

Cross-examination.

By Mr. Leslie:

X Q. 237. Have you got that lease in your pocket which you showed Mr. Donnellan?

A. Yes (producing lease).

X Q. 238. Mr. Duignan, you always ran this place as a hotel and cafe, did you not, from the time you entered into possession?

A. Yes, sir.

X Q. 239. Do you keep a register?

A. A hotel register?

X Q. 240. Yes.

A. Yes.

X Q. 241. Do you know your patrons?

A. A good many of them, yes.

X Q. 242. Did you keep a register around this time that you are [fol. 175] charged with violating the law and selling liquor?

A. No, I think not.

X Q. 243. Did you keep a register at that time?

A. What kind of a register do you mean?

X Q. 244. A hotel register?

A. We always have a hotel register for the rooms.

X Q. 245. Have you got the hotel register for the rooms at or about the time that you are charged with the sale of liquor?

A. I think we have it in the store.

X Q. 246. The greatest income from that place while you ran it was from the liquor sold, was it not?

A. The rooms.

X Q. 247. The rooms?

A. The rooms were good.

X Q. 248. What do you charge for your rooms?

A. Now, we are charging \$1.50 a night. We used to let them one night for a dollar, a dollar and a quarter, but now we are getting \$9 a week for them.

X Q. 249. So that at one time you were renting them for a dollar and a dollar and a quarter?

A. Yes, and a dollar and a half.

X Q. 250. So that it would average between a dollar and a dollar and a quarter, anyway?

A. If we rented all the rooms.

X Q. 251. That is if you did, but you never did rent all the rooms for a length of time?

A. Oh, yes.

X Q. 252. How many permanent guests did you have in your place?

A. At one time?

X Q. 253. Yes.

A. I would say half the rooms.

X Q. 254. That would be 25 permanent guests?

A. That is all; we would hold the rest for transients.

X Q. 255. So that you had most of the 25 permanent guests in that hotel?

A. Around that.

X Q. 256. And how much would they pay?

A. At the present time?

[fol. 176] X Q. 257. I mean at the time you had them full as permanent guests, 25 of them?

A. How much were they paying?

X Q. 258. Yes, a week?

A. Some of them six and eight dollars, according to the location.

X Q. 259. And if they rented by the year, they paid less, did they, or did they pay more?

A. We only rented by the week or night only.

X Q. 260. How much was the greatest rent a weekly guest, the weekly permanent guest would pay you?

A. \$9.

X Q. 261. \$9 was the highest rent you got?

A. Except if we rent a room to two, if we rent to two we got \$12.

X Q. 262. How many rooms did you rent to permanent guests with two in a room from which you received \$12 a week?

A. I would not say many. I would say maybe two or three or less, in a month.

X Q. 263. Would it be—

A. They took it by the week, actors come there and rent them by the week.

X Q. 264. The other 25 rooms in the hotel you got from \$1 to \$1.50 a day?

A. Yes.

X Q. 265. Were the 25 transient rooms always filled every night?

A. Sometimes not. Now they are.

X Q. 266. How many nights during the week would you say you averaged a full house on transient rooms?

Mr. Donnellan: I do not like to be objecting, but I think it is immaterial.

The Court: I suppose he is trying to show that this lease is still profitable. I do not know.

A. I can tell you how much rent we take in by the year.
[fol. 177] X Q. 267. Mr. Duignan, if you please, you have been in the hotel business 25 years, you say?

A. I have.

X Q. 268. You can answer that question?

A. I was in the saloon business—

X Q. 269. You can answer that question, how many nights a week would you have the 25 transient rooms filled to capacity?

A. In the summer time we would not have so many, other times we would; it is a funny location. You fill it one night and tomorrow night you would have three or four empty.

X Q. 270. Do you keep a ledger or set of books showing the rental of these premises and the income that you derived from them?

A. Yes, sir.

X Q. 271. Have you got that now?

A. I don't think I have.

X Q. 272. You said, I believe, that you served in the neighborhood of 100 meals a day?

A. Eighty to one hundred.

X Q. 273. What would be the average amount or price paid for the meals, each?

Mr. Donnellan: I do not see that that is material, if your Honor please.

The Court: I think it might be.

A. Thirty-five, forty cents, thirty cents some of them.

X Q. 274. So that your average income from your restaurant was about \$35 a day?

A. Around that, or less.

X Q. 275. Would you say it was \$30 a day?

A. I would say around \$25.

X Q. 276. About \$25 a day income the restaurant?

A. That is the best of my opinion.

X Q. 277. What did you say was the average rent from your [fol. 178] transient rooms a day?

A. I never kept a real record of that.

X Q. 278. I thought you told the Court that you kept a set of books showing the income?

A. I did have notes, but a lawyer died, and I lost them two years ago. Last year I can tell you what I took in.

X Q. 279. Give us your best recollection, then?

A. Of the rooms?

X Q. 280. Yes.

A. We just keep a record on a slip of paper now of the rooms we rent and at the end of the year, last year I think it was \$13,400 from the rooms.

Mr. Leslie: I did not ask you that. I move to strike that out.

X Q. 281. I asked you to give us your best recollection of what you took in from those transient rooms a day at the time that these violations are alleged to have been committed by you?

A. Over \$40 a day.

X Q. 282. About \$40 a day?

A. Yes, or around there.

X Q. 283. It would not be \$50, would it?

A. No.

X Q. 284. And it would not be \$30?

A. I don't think so.

X Q. 285. You think it would be \$40?

A. I believe so, at the least.

X Q. 286. That is your best recollection?

A. It may be a little more.

X Q. 287. How much a week would you take in from your permanent guests, I mean at that time?

A. I am giving you the permanent guests and the other ones at the same time, I am giving them together.

X Q. 288. The whole thing, then, permanent guests and transient guests would net you somewhere around \$40 a day income?

A. That is right.

[fol. 179] X Q. 289. How much would you take in in the saloon?

A. Around, up to \$35, \$40, around that amount.

Mr. Donnellan: What do you mean, for the drinks?

The Witness: For the drinks, you mean?

X Q. 290. Yes.

A. Around \$35.

X Q. 291. That is the only thing you take in in the saloon?

Mr. Donnellan: No, he takes in for the meals.

A. No, for meals.

X Q. 292. You have given me the meals?

A. Yes.

X Q. 293. Now, give me the drinks. A. Around \$35.00 a day for the drinks. In the summer time a little more than that.

X Q. 294. And you keep open Sundays, of course?

A. We keep open every day, we have to keep open on account of the hotel.

X Q. 295. Before the Constitutional Amendment went into effect, how much did you take in from the saloon a day?

A. I could not tell you the exact amount, but I would be guessing at it, over \$100.00 a day.

X Q. 296. Over \$100.00 a day?

A. Yes, sir, and that is in the end.

X Q. 297. So when this prohibition went into effect, your receipts from your saloon dropped three-quarters of what it used to be?

A. It certainly do.

X Q. 298. You said that you wanted permission from the landlord to take the bar out of that place and to revise it; is that correct?

A. I asked the landlord to let me put in some other business—

X Q. 299. Answer that question yes or no.

[fol. 180] Mr. Donnellan: Let him answer.

A. I did not say exactly a bar; I said change the place.

X Q. 300. Didn't you testify here today that you asked the landlord for permission to take the bar out?

A. To permit me to put in some other business.

X Q. 301. You know what I am asking you now, don't you, Mr. Duignan?

A. Yes.

X Q. 302. That is plain English, I think. Did not you testify today that you asked the landlord to permit you to take down the bar, and he said you could not?

A. To change the place; I did not say anything about the bar; I wanted to change the place to some other business.

X Q. 303. Is there anything in the lease which prevents you from taking the fixtures out of that store?

A. Well, it says that I cannot do any alterations——

Mr. Donnellan: I respectfully submit, if your Honor please——

Mr. Leslie: I have not finished my question.

Mr. Donnellan: I respectfully refer to the stenographer and ask that the question be read. It seemed as if you finished it.

X Q. 304. And put tables in there to sell your lunch and food as you do in the rear part?

A. I don't really know whether I can put in a cafeteria or restaurant.

X Q. 305. Did you ever attempt to take your fixtures out of that saloon and install tables where you could serve the lunch that you do in the rear room?

A. I never did.

Adjourned to March 11th, 1924; 10:30 A. M.

[fol. 181]

New York, March 11, 1924—10:30 a. m.

Trial resumed.

JOHN CONNORS, called as a witness on behalf of the defendant Duignan, having been duly sworn, testifies as follows:

Direct examination.

By Mr. Donnellan:

Q. 1. Mr. Connors, where do you live?

A. 51st Street, 330 West. 330 West 51st Street.

Q. 2. Are you married?

A. No, sir.

Q. 3. What is your occupation?

A. I am a clerk.

Q. 4. Where do you work?

A. Mr. Duignan.

Q. 5. What?

A. Mr. Duignan, 42nd and Eighth Avenue.

Q. 6. You tend bar there, do you not?

A. Yes, sir.

Q. 7. How long have you worked there?

A. About a year and three months.

Q. 7. What do you sell in the place?

A. Near beer, ginger ale, sarsaparilla, soda.

Q. 8. How is that bar laid out?

A. It is a horseshoe bar.

Q. 9. It is not a straight bar, is it?

A. No.

Q. 10. Where is the cash register?

A. What?

Q. 11. Where is the cash register located?

A. Right on the bar; on the back of the bar.

Q. 12. In plain view of anybody standing in front of the bar?

A. Yes, sir.

Q. 13. Do you ever keep the numbers that are rung up, covered with anything?

A. No, sir.

Q. 14. Have you ever sold any liquor there consisting of whiskey or liquor containing more than half of one per cent alcohol since you have been working in the place?

A. No, sir.

[fol. 182] Q. 15. You were working there in the last of June, were you not?

A. Yes.

Q. 16. May also?

A. Yes, sir.

Q. 17. Take a look at these men. Did you ever see these men before to your knowledge in the place at 330 West 51st Street (indicating O'Connor and Westings)?

A. Never seen them before.

Q. 18. Take a good look at them.

A. Never seen them.

Q. 19. Mr. O'Connor testified in this case that he had been in there seventeen or eighteen times in the month of April or May, 1923, and he had formed your acquaintance, and that during those seventeen or eighteen visits he did not succeed, or did not ask, as he testified for any whiskey, but he did state that around about the 25th or the 26th of May, 1923, that you called a man named Tony and whispered something to Tony and that Tony then got them whiskey. Is that so?

A. Never did.

Q. 20. Did you ever ask Tony to get whiskey for either O'Connor or Westings or any one else?

A. No, sir; now I never sold whiskey while I was there.

Q. 21. Did you ever see Tony sell whiskey to anybody?

A. Never.

Q. 22. Did you sell whiskey to anybody?

A. No, sir.

Q. 23. Did you see whiskey used in the premises there?

A. Never.

Q. 24. What was your previous occupation?

A. In the real estate business.

Q. 25. With whom?

A. Edward Gillespie.

Q. 26. Where is his office?

A. Up in the Bronx.

Q. 27. What number?

A. I could not exactly tell you the number. It is on Washington Avenue and 180th Street.

[fol. 183] Q. 28. What number?

A. 180th Street.

Q. 29. On Washington Avenue?

A. Yes.

Q. 30. How long were you with him?

A. Five years.

Q. 31. Prior to that time what had been your occupation?

A. I had been a bartender.

Q. 32. For how many years?

A. Five.

Q. 33. Have you ever been convicted of any violation of the Volstead Act?

A. No, sir.

Q. 34. Or of the Mullin-Gage Act?

A. No, sir, never.

Q. 35. Or of the old liquor law of the State of New York?

A. No.

Q. 36. Have you ever on any occasion——

A. Never was arrested before.

Q. 37. Given any liquor to anybody in the Duignan premises?

A. No, sir, never.

Q. 38. Or seen Tony or any other employee selling liquor?

A. No, sir, I did not.

Cross-examination.

By Mr. Clark:

X Q. 39. You say you were a bartender before you were here?

A. Yes, sir.

X Q. 40. Where were you a bartender before you went to Duignan's?

A. In the Bronx.

X Q. 41. In a saloon up there?

A. Yes.

X Q. 42. What saloon was that?

A. 180th Street and Clinton Avenue.

X Q. 43. Regular old time saloon?

A. Yes.

X Q. 44. Were there any arrests there for violating the law?

A. No.

X Q. 45. Nobody ever arrested there?

A. No.

X Q. 46. When were you there, what years?

A. I was there from 1920 to 1924—1920 to 1922.

[fol. 184] X Q. 47. Is that still a saloon up there?

A. No.

X Q. 48. Go out of business?

A. Yes, sir, went out of business.

X Q. 49. In 1922?

A. Yes.

X Q. 50. What is the address?

A. 2080 Clinton Avenue.

X Q. 51. 2080 Tenth Avenue?

A. Clinton.

X Q. 52. Down here at Duignan's there have been arrests there for violations of the law, have not there, since you have been there?

A. No, I never seen any.

X Q. 53. Did you ever see any policemen in there?

A. I did, yes.

X Q. 54. What were they in there for?

A. What is that?

X Q. 55. What were they in there for?

A. Looking the place over, looking for whiskey, I suppose, to see if they could find any.

X Q. 56. Did not they ever make an arrest while you were there?

A. No, never, no.

X Q. 57. You swear that no arrest was ever made while you were there, is that right?

A. That is right.

X Q. 58. When did you go there to Duignan's?

A. When did I go there? A year last Thanksgiving.

X Q. 59. That is November, 1922?

A. Yes.

CLAUDE CAPPONI, called as a witness on behalf of the defendant Duignan, having been duly sworn, testifies as follows:

Direct examination.

By Mr. Donnellan:

Q. 1. What is your name?

A. Claude Capponi.

Q. 2. Claude Capponi?

A. Yes.

Q. 3. Capponi?

A. Yes, Capponi.

[fol. 185] Q. 4. Are you the man that works in Duignan's that is known as Tony?

A. Yes.

Q. 5. Is that the name they call you there?

A. Instead of they call me Capponi, they call me Tony for short.

Q. 6. And how long have you been working in Duignan's?

A. Since the 23 of November, 1922.

Q. 7. Were you in court Friday and yesterday, in this court?

A. I was here in court yesterday.

Q. 8. Yesterday?

A. Yesterday.

Q. 9. What are your duties in Dugnan's?

A. I am a lunch man and letting rooms and tending to the back room, serving lunches and soft drinks and stuff like that.

Q. 10. Is part of your duties serving whiskey; do you serve whiskey there?

A. No, sir.

Q. 11. There has been some testimony in this case that on different occasions you served whiskey to customers in the back room.

A. That is a lie. I never sold any whiskey. When Mr. Duignan employ me that is the first thing he told be, that never to sell any intoxicating liquor because if I do it will be under my responsibility. I never did and never will.

Q. 12. You never did?

A. Never.

Mr. Donnellan: Mr. O'Connor, will you stand up again, and Mr. Westings?

Q. 13. Take a good look at both of these men that are standing here. Both of these men testified that you sold them whiskey in small bottles.

A. I do not think I ever saw them gentlemen before in my life.

Q. 14. You do not recall seeing them at all?

A. No, sir.

Q. 15. Did you ever sell them whiskey?

A. No, sir, never did.

[fol. 186] Q. 16. Did you ever sell anybody in Duignan's place whiskey?

A. No, sir.

Q. 17. You were arrested in March, were you not, at the time the agents came with a search warrant and broke into a room?

A. Yes, sir.

Q. 18. Tell us what happened that night.

A. I was serving lunch back of the bar and a man walked in saying that he was living upstairs, he used to live upstairs, and he told me to go up and open certain rooms and I told him I had no key, that the room was rented.

Q. 19. What room was it, room seven?

A. Room seven.

Mr. Clark: I object to prompting the witness.

Mr. Donnellan: I think that witness testified that it was room seven.

Q. 20. This man that said he had been living upstairs asked you to go up and open room seven?

A. Yes.

Q. 21. What did you tell him?

A. And they told me to open the door. I told him I could not open the door because I had no key, that the room was occupied, was occupied by the week, the room was occupied at that time.

Q. 22. And what happened?

A. And so they insisted upon me to open the door and I told him, "I have no key. If you do not believe, search me." And finally they would not search me and they bust in the door.

Q. 23. They found some liquor there?

A. They found some liquor there. I do not recollect really what it was. Some small bottles or pints. I do not remember.

Q. 24. Did you own that liquor?

A. No, sir.

[fol. 187] Q. 25. Had you served any of that liquor to customers?

A. No, sir.

Q. 26. Did you ever sell a half pint of whiskey to one of these men that I had stand up in court?

A. No, sir.

Q. 27. Did Mr. Duignan ever tell you to sell any liquor in that place?

A. He told me when first he employed me not to, because it is being done, and he told me, "Be careful not to do the same," because I was doing under my responsibility. I never did.

By the Court:

Q. 28. Where is your pass key, that you did not have a pass key to that number seven?

A. The pass key was downstairs.

Q. 29. Why did you not get it?

A. At the time we could not find it.

Q. 30. What was the matter; do you not have a pass key or master key that you can get into any room with?

A. I do not know if the boss had it in his pocket or where it was. I do not know, but we could not find it at that time.

Cross-examination.

By Mr. Clark:

X Q. 31. Did you ask the agents to wait until you could get the pass key for them?

A. Yes, sir, I told him to wait for Mr. Duignan, that he would be in soon and he will open all the doors for him.

X Q. 32. Where was this room seven?

A. On the first floor.

X O. 33. Right above the back room, was it?

A. No, it was all the way around the hall, all the way around.

X Q. 34. The stairs went up alongside the back room, did they

not; did not the stairs go up to the second floor where this room [fol. 188] was?

A. We have to go through the back room to go up one flight of stairs.

X Q. 35. When you get up to the top, how far do you have to go to get to room seven?

A. It is all the way around.

X Q. 36. You had been in that room before?

A. I might have been. I might have been because I went there, maybe they want something, or bring up packages or parcel post or something or they leave a call and then I have to go up and call them.

X Q. 37. Mr. Duignan said that the man who lived there was a man named Jensen or something like that?

A. I do not recollect who it was.

X Q. 38. As a matter of fact it was a linen closet, was it not?

A. Linen closet?

X Q. 39. You kept linen in that room, in room seven?

A. It was a linen room; it was a closet and a clothes closet.

X Q. 40. Who was the man that lived there?

A. I do not remember his name. I do not know.

X Q. 41. How long had he been there?

A. Where?

X Q. 42. How long had he lived in that room seven?

A. I do not recollect. I do not remember that, because I am not the only one that rents rooms.

X Q. 43. You were not the only one?

A. No, sir.

X Q. 44. Who else rents them?

A. The bartender and the night clerk. Mr. Duignan, everybody who happened to be around.

X Q. 45. Did this man just come in for a night or had he been there for some time?

A. I do not remember. I think he was by the week.

X Q. 46. Do you remember what he looked like?

A. I could not recollect, no, sir.

X Q. 47. Do you remember this Bosch & Lawson that had rooms forty-two and forty-four?

[fol. 189] A. Well, I remember this Bosch, that he was living for some time up there.

X Q. 48. Up in forty-two?

A. Yes, by going up and down the room, that is it.

X Q. 49. You knew him pretty well?

A. No, sir, because he did not have a key of the downstairs and so every evening came I had to go and open the hotel door for him to go up in his room.

X Q. 50. Sometimes you would go upstairs with him, would you not?

A. No, sir. I had no occasion to go up with him.

X Q. 51. Did not you ever go into room seven with him?

A. No, sir.

X Q. 52. You are sure you never went into room seven with him?

A. No, sir, I never did.

X Q. 53. He did not have any key to room seven, did he?

A. As far as I know, I do not think so.

X Q. 54. You never saw him go in there, did you?

A. I do not think he did, because I never had any occasion to go into that room.

X Q. 56. Where did you get the liquor from that you sold to Bosch?

A. I do not know who——

X Q. 57. Now, where did you get the liquor from that you sold to Bosch?

A. I did not sell any. I never did sell any.

Mr. Donnellan: I think that question is unfair, your Honor.

Mr. Clark: That is part of the cross-examination.

X Q. 58. Where did you work as a bartender before you went to Mr. Duignan's?

Mr. Donnellan: I object to that question. There is no testimony that he was a bartender before he went to Duignan's.

[fol. 190] A. I was not a bartender. I was working in St. Regis Restaurant, Forty-third Street and Broadway.

X Q. 59. What did you do there?

A. I was a counterman.

X Q. 60. What is that?

A. Serving coffee, making sandwiches and all that stuff.

X Q. 61. Is that a saloon, too?

A. No, sir, that is a restaurant.

X Q. 62. It is quite different from Duignan's place?

A. Yes, sir. In Duignan's place I worked on ready dishes, goulash, roast pork, and roast beef and all that kind of stuff.

X Q. 63. This Mr. O'Connor when he was on the stand, he had no difficulty in picking you out, did he, when you were sitting back here in the room?

Mr. Donnellan: I object to the question as calling for a mental operation of the witness's mind. How does he know that?

X Q. 64. He did pick you out, did he not?

A. Well, I do not see why he should not pick me out. When a man makes up to do some mischief, well, he is sure that he is going to do it.

X Q. 65. But you are sure that you never saw him before?

A. I might have seen him. I am not positive.

X Q. 66. You are not positive?

A. No, sir.

X Q. 67. When Mr. Donnellan asked you you said you never saw him?

A. As far as I can see I never saw that gentlemen before.

X Q. 68. Now, you are not positive. Which is right?

Mr. Donnellan: I object. There is no conflict in those answers.

A. He might have come in the place, but as far as I know I do not know them at all.

[fol. 191] Cross-examination.

By Mr. Leslie:

X Q. 69. Did you ever see this man before (indicating Mr. Reager)?

A. No, sir.

X Q. 70. Did you sell him a drink of whiskey?

A. No, sir.

By Mr. Clark:

X Q. 71. At any time—can you remember back as far as June 8th, 1923?

A. Well—

X Q. 72. You were working for Duignan at that time, were you not?

A. Yes. I was working for him.

X Q. 73. Do you remember Westings coming into that store with this man and introducing him to you as an ironworker, with him?

A. No, sir, I do not remember.

Mr. Donnellan: I think the question is objectionable. He has testified he did not recollect.

X Q. 74. I want you to take a good look at him.

Mr. Donnellan: He said he did not know him.

The Court: You may answer.

A. I never saw him before. I do not think I ever have seen him before.

X Q. 75. Are you sure or are you uncertain?

A. I never saw him before.

X Q. 76. Then you did not sell him a drink of whiskey on June 8th, 1923, in Duignan's saloon at Forty-second Street and Eighth Avenue?

A. No, sir.

X Q. 76. Were you ever arrested for selling liquor?

A. No, sir. Let's see.

[fol. 192] Mr. Donnellan: He was arrested—

Mr. Clark: No, wait a minute, Mr. Donnellan.

A. Yes, I was arrested at the beginning of the prohibition law. I was working in May & Finn, Forty-fourth and Eighth Avenue.

X Q. 77. You were working where?

A. May & Finn, Forty-fourth Street and Eighth Avenue. They are now out of business.

X Q. 78. That was at the beginning of prohibition?

A. Yes.

X Q. 79. When were you arrested next?

A. Well, they made a couple of arrests. They arrest everybody in the place at that time.

X Q. 80. I did not ask you that. When were you arrested the next time?

A. I never was arrested after that.

X Q. 81. That was the only time?

A. Yes, sir.

X Q. 82. Were you not arrested in that raid at Duignan's saloon?

A. Yes, sir.

X Q. 83. Duignan went on your bond, your bail bond?

A. Somebody came down and bailed me out that night.

X Q. 84. Then you were a bartender before you were a bartender for Duignan?

Mr. Donnellan: I object to that question. It is absolutely uncalled for by the testimony.

There is no testimony that this man ever was a bartender for Duignan and I think the question is wholly improper.

The Court: You may ask him before he worked for Duignan.

X Q. 85. You were a bartender before you worked for Duignan?

A. I worked for May & Finn as a lunchman and I was selling [fol. 193] sandwiches on my own account, but they arrested everybody when they made the raid.

X Q. 86. That was right in the beginning of prohibition?

A. Yes, sir.

X Q. 87. Did you tend bar before you went to work for him?

A. No, sir, never did tend bar.

EDMUND MELANSON, called as a witness on behalf of the defendant Duignan, having been duly sworn, testified as follows:

Direct examination.

By Mr. Donnellan:

Q. 1. Mr. Melanson, what is your occupation?

A. I am a steward on a private yacht.

Q. 2. Talk up loud.

A. I am a steward on a private yacht at present.

Q. 3. What yacht?

A. The yacht of Mr. Borden of 90 Worth Street, B. H. Borden.

Q. 4. 90 Worth Street?

A. Yes, sir.

Q. 5. And where do you live?

A. I live at the Hotel Duignan, Forty-second Street and Eighth Avenue.

Q. 6. How long have you lived there?

A. Off and on, for about four years and a half.

Q. 7. Did you ever work for Duignan?

A. Yes. In 1921, in the middle of August, to about the middle of November.

Q. 8. And what was your occupation?

A. As a lunchman.

Q. 9. What were your duties as a lunchman?

A. To serve lunch, behind the lunch bar and some lunches in the back room.

Q. 10. That is, you occupied almost the same sort of a position [fol. 194] as this man Capponi that preceded you on the stand?

A. Yes, sir.

Q. 11. How long did you work there?

A. For three months.

Q. 12. You lived there for four years?

A. Yes, sir.

Q. 13. Did you sell any intoxicating liquor containing more than one-half of one per cent of alcohol by volume at the time you worked there?

A. No, sir.

Q. 14. Did you see any sold in the place?

A. No, sir.

Q. 15. Did you see any used in the place?

A. No, sir.

Q. 16. Since prohibition, since you have lived there, since prohibition which began in July, 1918, have you seen liquor—by liquor I mean intoxicating liquor—dispensed in Duignan's premises?

A. No, sir.

Q. 17. Have you seen it handed out by any of the employees to any of the customers?

A. No, sir.

Q. 18. You have never been arrested for any violation of any liquor law, have you?

A. No, sir.

Cross-examination.

By Mr. Clark:

X Q. 19. What is your name?

A. Edmund Melanson.

Cross-examination.

By Mr. Leslie:

X Q. 20. Did you tell anybody what you were going to testify here today?

A. No, sir.

X Q. 21. Did not speak to anybody about it?

A. No, sir.

X Q. 22. You are quite sure of that?

A. Absolutely.

X Q. 23. You did not talk to anybody?

A. Did not talk to anybody, no, sir.

Mr. Donnellan: The defendant Duignan will rest.

[fol. 195] PETER REAGER, called as a witness on behalf of the defendant Pall Mall Realty Corporation, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Leslie:

Q. 1. Mr. Reager, you saw the witness Capponi on the stand?

A. I did.

Q. 2. You have testified in this trial before that on June 8th, 1923, that you were served with a drink of whiskey in Duignan's saloon by a man called Tony?

A. I did.

Q. 3. Did you recognize the man Capponi on the stand today?

A. I did.

Q. 4. Is he the man that served you with the liquor on that day and who was called Tony?

A. He is.

Mr. Donnellan: I object to that as not proper rebuttal.

The Court: He can identify this man. He identified him the other day.

Q. 5. Was Mr. Westings with you at that time?

Mr. Donnellan: I object to that as not proper rebuttal. He has testified he was.

The Court: Yes.

Q. 6. Did you see the other witness named O'Connor that was on the stand this morning?

A. I seen him the other day, not this morning.

Q. 7. You recognize him as being one of the men working in the place at the time Tony served you with liquor?

A. You mean the man that was just on the stand?

Q. 8. No.

The Court: He said he did not see him this morning.

Mr. Clark: You said O'Connor. You mean Connors.

[fol. 196] Mr. Leslie: Connors, the man that was the first witness.

The Court: I understood you to say you were not here this morning; is that right?

The Witness: Yes, sir.

The Court: Is he here now?

Mr. Donnellan: I let him go back. I thought they excused him.

Cross-examination.

By Mr. Donnellan:

X Q. 9. Mr. Reager, do you remember testifying the other day that the bar in Duignan's place is a straight bar running parallel with the south wall of the building?

A. I do.

X Q. 10. Do you so testify now?

A. To my memory I so testified.

X Q. 11. That it was not a horseshoe bar at all?

A. No, I say that it goes around on one end and runs straight down.

X Q. 12. You mean the same as any straight bar that has a curve to one end? You sat here in court though and heard Duignan testify that it was a horseshoe bar?

A. I have not heard Duignan testify.

X Q. 13. Were you not here yesterday?

A. I did not hear Duignan testify.

X Q. 14. You did not arrest anybody as a result of your visit there on June 8th, did you?

A. I did not.

Defendants' proofs closed.

[fol. 197]

REBUTTAL PROOFS

JOSEPH O'CONNOR, recalled as a witness on behalf of the plaintiff in rebuttal, having been previously sworn, testified as follows:

Direct examination.

By Mr. Clark:

Q. 439. Mr. O'Connor, there was a man named Connors on the stand; did you recognize him?

A. Yes, sir.

Q. 440. Where did you see him before?

A. In Duignan's Cafe, Forty-second Street and Eighth Avenue.

Q. 441. Is he the man that you described as Connors?

A. He is.

Q. 442. That gave orders to Tony?

A. Yes, he is.

Q. 443. And Caproni is the man you identify as Tony?

A. Yes.

Cross-examination.

By Mr. Donnellan:

X Q. 444. Have you your affidavit with you that you were reading from the other day?

A. Yes.

X Q. 445. Let me see it. Look at it yourself. Have you a record on there of any violation on June 4, 1923?

Mr. Clark: I object to this as not proper cross-examination, if your Honor please.

The Court: I will allow it.

A. No, not on June 4.

X Q. 446. Were you here in court when Westings testified that he was in Duignan's premises with you on June 4 and you had two or three rounds of drinks?

A. I was.

X Q. 446. Which is correct, your testimony or his?

[fol. 198] A. His testimony. I omitted that date in my affidavit. An oversight on my part. He is correct.

X Q. 447. How do you know that?

A. Because that was the first day we went there.

X Q. 448. You are testifying from your recollection, are you not?

A. I omitted that.

X Q. 449. You are testifying here from your recollection?

A. And by a memorandum.

X Q. 450. And he had no memorandum at all, did he?

A. He had at the time.

X Q. 451. He was testifying from his recollection, was he not, when he was on the stand?

A. I do not know.

X Q. 452. Well, you did not see him using any papers?

A. No, sir.

X Q. 453. Did not you hear me ask him for the memorandum and he said he had it in Riley's office?

A. He did not have it with him.

X Q. 454. You, the day before, had testified from a written memorandum, a copy of an affidavit?

A. This affidavit in my hand.

X Q. 455. And now you say he is correct?

A. He is correct.

X Q. 456. And that you have not any record of June 4?

A. I omitted it.

X Q. 457. Did you reply in answer to a question put by me as to whether or not that is a correct statement as to anything that happened do you remember saying "Yes"?

A. I do.

X Q. 458. Now, you say it is not?

A. My memory was refreshed by his stating that we were there on that day and I recall that we were there.

X Q. 459. Now, what sort of day was June 4, 1923?
[fol. 199] A. The first day I went up there with him, as I recall it, it was a nice clear day.

X Q. 460. You were in Duignan's seventeen or eighteen times prior to that, were you not?

A. I was, yes.

X Q. 461. Probably twenty times?

A. Probably.

X Q. 462. And now you can distinctly recall what happened on June 4th?

A. Yes, I recall the day.

X Q. 463. Let me have that memorandum here. Tell me what happened there on April 27th, 1923.

Mr. Clark: I object to this, if your Honor please.

Mr. Donnellan: I know, he has testified positively that he can recollect distinct things here on June 4, without having any memorandum before him.

The Court: Can you answer the question?

The Witness: Not offhand that way.

X Q. 464. Can you testify what happened there on April 28th?

A. Other than I bought a couple of glasses of beer there.

X Q. 465. That is what you did on seventeen or eighteen occasions is it not?

A. Yes, sir.

X Q. 466. So that you are not recalling the beer because it is April 28th, are you?

A. It is one of the dates.

X Q. 467. You cannot recall anything that happened on any day as a matter of fact, without looking at the paper?

A. Oh, yes, I can. I recollect the day I bought the half pint bottle of whiskey.

X Q. 468. Let us hear what happened on May 5.

A. I bought a couple of glasses of beer there in the afternoon.

[fol. 200] X Q. 469. Let me read what your affidavit says happened on May 5. You went there in the afternoon?

A. I believe in the afternoon.

X Q. 470. Probably. Well, here is what your affidavit says: "May 5, about 7:45 P. M. I called at that place and had a brief talk with Mr. Duignan, on the repeal of the Mullin-Gage Act, which he seemed very sure would be passed, as he put it. So it was — in the afternoon at all, was it?"

A. I might have been in the afternoon there.

X Q. 471. Mr. O'Connor, did you not testify that as you visited these premises you made notes of what happened?

A. Yes, I did.

X Q. 472. And that this is a correct transcript of those notes, this affidavit?

A. Yes.

X Q. 473. Then why do you say you may have been there in the

afternoon when your affidavit recites that you were only there at 7:45 P. M. on that day?

A. I might have been there and did not put it in the affidavit.

X Q. 474. And you might have put statements in this affidavit that were not true, might you not?

A. Never. There is nothing in there that was not absolutely true.

Mr. Donnellan: I ask that that be stricken out.

Mr. Clark: The Government rests.

Rebuttal proofs closed.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Donnellan: Defendant rests.

Mr. Leslie: The landlord rests.

Mr. Donnellan: If your Honor please, I move to dismiss the proceedings on the merits.

The Court: Denied.

[fol. 201] Mr. Donnellan: I also move to dismiss the proceedings upon the question of law, that the People have failed to prove any violation on the part of this defendant. Also on the ground that the section of the Volstead Act under which the landlord interposed his separate plea for affirmative relief, is unconstitutional, in that it seeks to deprive this defendant of a property right, consisting of a leasehold which has been testified to as being of a value of over \$200,000, without due process of law.

Also on the ground that this proceeding is properly triable before a jury.

The Court: Your motion will be denied.

Mr. Donnellan: Exception. I also make a separate motion to dismiss the prayer for affirmative relief contained in the landlord's answer, namely, that the lease be set aside and vacated.

The Court: I have no doubt at all that a nuisance was committed upon those premises and that that was amply established by the evidence. I have little doubt but that the liquor in room number seven belonged to the defendant Duignan. It seems to me that having a hotel there he should know who occupied that room.

There has been no evidence, or no corroborative proof at any rate in the way of a register or room card that any bona fide guest occupied the room and that there was a great quantity of liquor there in individual bottles such as are desired to pass out to customers that could be used for illegitimate purposes.

It does seem, I am quite free to admit, that this lease is of such character that it is somewhat harsh perhaps to cancel it absolutely, running, as it does, for a great many years.

I have a discretion under the law however, it is extremely doubtful, and it is of course to be said on the part of the landlord, this view, namely, that the lease was for a legitimate purpose and it was

[fol. 202] at all times within the power of Duignan to protect it by carrying on a legitimate business.

I do not know what this decision was of Judge Woodruff about which certain accounts have appeared in the newspapers as to the unconstitutionality which he says existed with respect to certain features of this law, and if you will undertake to get a copy of that opinion, I will be glad to consider the question of the cancellation of the lease, but I have no doubt at all, as I said a moment ago, that Duignan did maintain a nuisance there and I should not hesitate to grant a cancellation of the lease, were it not that it does involve such a large sum of money. It may be that Duignan's conduct has been such as to cancel any rights he may have, whatever may be the value of that lease.

Mr. Donnellan: Your Honor has stated that in your opinion Duignan was violating the law and your Honor suggested the fact that there was liquor found in room 7. Might I also refer to the fact that at that time, according to the evidence in this case, these landlords had two private detectives living in this house who accompanied those special agents and we can just as legitimately draw the inference that if there was liquor there it was planted by these agents in that room for the purpose of accomplishing the purpose, namely, so as to secure a cancellation of the lease by the landlords.

The case here is built up entirely on the testimony of private detectives, whose testimony is always looked upon with suspicion and in most cases requires corroboration.

The Court: He testified, as against Tony, who was evidently an authorized person.

Mr. Leslie: May I call Mr. Donnellan's attention to the liquid outside of room seven that the detectives discovered in the linen [fol. 203] closet, and that Tony testified this morning that Boscch, who occupied number forty-two, did not have a key to room seven, and may I also call your Honor's attention to the fact that the United States has entered a decree pro confesso in which Mr. Donnellan appeared for both Duignan and Capponi, the witness this morning.

Mr. Donnellan: Duignan told me he was not selling any liquor. What do these decrees do? They only restrain a man from doing something he has not right to do and what was the use of taking up the time of the Court—

Mr. Leslie: It is a very valuable lease, nevertheless. May I call your Honor's attention to the statement of their own witness who testified that if that lease could not be reformed and had to stay as it was, that the premises had no value as a renting proposition.

The Court: I do not recall that his testimony went to that extent. His testimony, as I remember it, was that the lease would not be nearly so valuable as he testified it would be if the tenant could do what he chose with respect to alterations.

Mr. Leslie: But he also testified, if I may call your Honor's attention to it, that nobody would take the premises in its present condition.

Mr. Clark: I am not particularly interested in this controversy between the landlord and the tenant, but this place has been a

nuisance since 1920, when the first injunction proceeding was started, and this man Smith plead guilty and pro confesso was taken.

Mr. Donnellan: His Honor ruled out the conviction of Smith.

Mr. Clark: I do not think it is sufficient for Mr. Donnellan to say that he cannot believe private detectives. O'Connor made a very good impression on me that he was telling the truth and I am particularly anxious that we should get a decree here.

[fol. 204] Mr. Donnellan: I presume we are all here trying to do what is right. I presume that the landlord is actuated by his high regard for the Volstead Act and not by reason of any pecuniary gain that he might make, and as the attorney for Duignan I want to state on this record that his fixtures will come out tomorrow if the landlord can give his consent as to the alterations, and put in decent windows and put it up as a cafeteria. We do not intend to sell liquor and they do not care whether we sell any liquor or not. They simply want the premises.

Mr. Clark: The United States Government cares, and we are entitled to close that place up. I want to get a decree here just as we get it in any other saloon. What your Honor does between the landlord and the tenant does not interest me particularly, except that I really believe that if the landlord goes in there they would not put a saloon in there or have a blind tiger. Like any other reputable landlord—

Mr. Donnellan: If your Honor please, it is part of the record of this case that some years ago Duignan had a lease drawn up with the National Drug Stores, which is as reputable a concern as the Liggett Company or the Riker-Hegeman Company and at first would not consent to his signing of the lease.

Now, if they were in earnest and really meant that they were against the alleged violations of the Volstead Act, why did they not consent to the assignment of a lease to reputable drug stores? You cannot run a restaurant with those old bar fixtures in or without changing the front. They would not grant their consent. They do not want equity so far as Duignan is concerned.

Mr. Leslie: This hotel, if your Honor please, is nothing more or less than a lodging house. It is a dollar a day lodging house. The meals are forty cents, thirty cents, and it is run as nothing more or [fol. 205] less than a cloak for bootlegging liquor, ever since prohibition went in force.

The Court: I will consider the situation with respect to the lease. As is now stands, I do not see anything else that I can do except to cancel, but I will consider this decision of Judge Woodruff, for whom I have a very high regard.

Mr. Clark: Cannot we take a closing order now? That does not affect the lease proposition at all.

The Court: I think you are entitled to a closing order.

Mr. Donnellan: I will take an exception to a closing order, if your Honor please; if a valuable lease like this can be broken off on alleged violation, when there has been no conviction, not one, that law has gone to the dogs. There is no such thing as law left

in this country, if you are going to deprive a man of a lease worth \$200,000.

The Court: The difficulty is, Mr. Donnellan, I do not know whether that lease contains a clause, but I assume that it does, and if a man makes an amendment that he will not maintain or carry on a nuisance or violate the law, why, he has little ground to complain if some one insists upon forfeiture of the lease for his violation of the law.

Mr. Donnellan: That part is true, your Honor, but I maintain that as a collateral issue in this case your Honor has no authority.

The Court: I will close the place for six months in any event.

Mr. Leslie: I may make my usual motions for judgment?

The Court: Yes, I will take that into consideration.

Mr. Donnellan: Would your Honor withhold your decision until your Honor decides the question of the cancellation of the lease? [fol. 206] I think it is a case that raises a question of law as clearly as any that can possibly come before the Court.

The Court: I think I will close the place as far as that is concerned and I do not think there is any doubt about that.

Mr. Donnellan: Well, closing the place; that is practically foreclosing me of my rights on appeal.

The Court: No.

Mr. Donnellan: There are other provisions in the law, such as a bond.

The Court: If you want to come up for the question of cancellation of the lease, I am willing to make a decree now cancelling the lease and to stay the landlord from going into possession.

Mr. Donnellan: Well, I would not want your Honor to do that until your Honor was fully determined upon the law.

The Court: Then the premises will be closed meanwhile.

Mr. Leslie: I will agree to argue it next month or next week.

Mr. Donnellan: Just as a matter of equity, if the premises are closed, so far as the occupation as a cafe or restaurant is concerned, then I want it on the record as to whether this landlord will consent to a clothing store or drug store or any other line of business as a matter of equity.

Mr. Clark: He is the third man that has conducted the nuisance.

Mr. Donnellan: No, I will stipulate that Duignan goes out.

Mr. Leslie: This is all camouflage on the part of Mr. Donnellan.

The Court: I have made up my mind so far as the closing of the premises is concerned. I will close them. I will consider that [fol. 207] opinion if you want me to, or I will give you the decree now or allow you to immediately appeal so that you can get a—

Mr. Leslie: And ask for judgment on the cross bill?

Mr. Donnellan: I would like to have your Honor receive briefs.

The Court: All right.

Mr. Leslie: May I ask your Honor to fix the earliest possible time for the submission of briefs?

The Court: Get them in in a week.

Case closed.

New York, March 28th, 1924—10:30 a. m.

Appearances:

William Hayward, United States Attorney, Solicitor for plaintiff.
John Holley Clark, Jr., Assistant United States Attorney, counsel.

O'Connor & Donnellan, solicitors for defendant, Duignan. George L. Donnellan, counsel.

Leslie & Alden, solicitors for defendant, Pall Mall Realty Corporation. Warren Leslie, counsel.

Mr. Donnellan: Motion is made by the attorney for the tenant for a stay of the order closing the premises for a period of six months and also of the order cancelling the lease.

The Court: Motion denied.

Mr. Donnellan: Exception.

[fol. 208]

IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—March 20, 1924

KNOX, D. J.:

At the conclusion of the trial of the above-entitled action, which was brought by the Government for the abatement of a common nuisance, as defined by the National Prohibition Act, I announced that a decree might issue under which the premises leased by Duignan, and owned by the corporate defendant, should be closed for a period of six months.

The question of the cancellation of Duignan's lease, as prayed for by Pall Mall Realty Company in its cross bill, was taken under consideration. This course was pursued inasmuch as Duignan contends that the lease is of enormous value, and that the Realty Company is seeking to reap the advantage of such value to his detriment. [fol. 209] Furthermore, attention was called to the decision of Judge Woodrough, of the District of Nebraska in the case of *United States v. Maier*, filed March 7, 1924, wherein he held the provisions of the Prohibition Law under which this suit was brought, to be unconstitutional, and I was desirous of learning his reasons for such conclusion. The opinion is now before me, and has been considered.

The facts before Judge Woodrough were quite different from those here presented. In his case, the nuisance had ceased to exist. In this suit, the nuisance, I am ready to believe, continued down to the date upon which the bill was filed. Indeed, I have no doubt it continued to the date of trial. If under such circumstances, the decision has any present applicability, I must dissent therewith. But whatever may be the necessary inferences to be drawn from the language employed by the Court in the *Maier* case, its holding

to the effect that Section 22 of the National Prohibition law is unconstitutional and void, cannot be followed. The point is no longer arguable in this circuit. See *United States v. Reisenweber*, decided by the Circuit Court of Appeals upon January 18, 1923, where it was said:

"it is equally free from doubt that Congress has the constitutional power to authorize that an action to enjoin the nuisance can be brought in any court having jurisdiction to hear and determine equity cases as provided in Section 22."

Then, too, the Circuit Court of Appeals for the Seventh Circuit has held, in *Grossman v. United States*, 280 Fed. 683, that

"It needed no act of Congress to confer jurisdiction upon a court of equity to abate nuisances and to restrain individuals from maintaining them."

[fol. 210] There can be so serious doubt, I think, but that the decree to be awarded the Government is well founded in law.

As for propriety of awarding the landlord affirmative relief, I think it, too, should be granted. See *Grossman v. United States*, *supra*. The statute is without ambiguity with respect to a lessor's right to declare the forfeiture of a lease of premises wherein a tenant commits a nuisance, as defined by the Section 21 of the Act.

The provision is as follows:

"Any violation of this title upon any leased premises by the lessee or occupant shall, at the option of the lessor, work a forfeiture of the lease."

Congress doubtless assumed that many leases would have substantial value, and for that reason probably believed that such fact would tend to deter lessees from violating the law and thus jeopardizing their property rights. It was reasonably to be supposed that the more valuable the lease, the greater would be the disposition of the lessee to see that it was not subjected to forfeiture.

Duignan was chargeable with knowledge of the consequences that might arise from his disregard of the law. Nevertheless, he chose to conduct his business in almost open defiance of both the statute and his lease, and it is with poor grace that he now seeks to avert the impending loss of his lease. The evidence plainly shows that he took his chances with an enforcement of the law, and the assertion by his landlord of its statutory rights; he did so deliberately and the lease which he now prizes so highly, and which, to be preserved, required only an observance of the law, must now pass from him.

The Realty Company may have a decree cancelling the lease.

Jno. C. Knox, U. S. D. J.

[fol. 211] DEFENDANT'S EXHIBIT A IN EVIDENCE

This indenture, made the 4th day of May, nineteen hundred and twenty-one, Between Heyman Vogel and Matilda Vogel, his wife, residing at No. 56 East 80th Street, in the Borough of Manhattan, City, County and State of New York, party of the second part, and Pall Mall Realty Corporation, a corporation of the State of New York, having its principal office at No. 623 Eighth Avenue, in the Borough of Manhattan, City, County and State of New York, party of the second part,

Witnesseth, that the parties of the first part, in consideration of the sum of One Hundred (\$100.) Dollars, lawful money of the United States, and of other good and valuable considerations paid by the party of the second part, do hereby grant and release unto the party of the second part, its successors and assigns forever,

All that certain lot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, in the City of New York, County and State of New York, bounded and described as follows:

Beginning at the corner formed by the intersection of the southerly side of 42nd Street with the westerly side of Eighth Avenue, and running thence westerly along the southerly side of 42nd Street, 150 feet; thence southerly parallel with Eighth Avenue, 98 feet and 9 inches; thence easterly parallel with 42nd Street, 50 feet; thence northerly again parallel with Eighth Avenue, 16 feet 5 inches and 1/3 of an inch; thence easterly again parallel with 42nd Street and part of the way through party wall 100 feet to the Westerly side of Eighth Avenue, and thence northerly along the westerly side of [fol. 212] Eighth Avenue, 82 feet, 3 inches and 2/3 of an inch to the point or place of beginning; be the said several dimensions and distances more or less. Said premises being known as Nos. 300, 302, 304 and 306 West 42nd Street, and Nos. 651, 653, 655 and 657 Eighth Avenue.

Together with all the right, title and interest of the parties of the first part in and to the vault space under the sidewalk in front of the premises above described.

Subject to a certain mortgage thereof made by the said Heyman Vogel and wife, to Franklin Savings Bank, dated the 22nd day of November, 1904, and recorded in the office of the Register of the County of New York, on the 22nd day of November, 1904, in Liber 144, Section 4, of mortgages, page 491, on which mortgage there is now due and owing the sum of Three Hundred and Ten thousand (\$310,000) Dollars, with interest thereon at the rate of 5½% per annum.

Subject also to the following leases of various portions of said premises:

1. Two leases to James Duignan, dated April 20, 1916, and July 27, 1916, respectively.
2. Iselboro Amusement Corporation, dated August 15, 1917.

3. Kurnick Waist Shop, Inc., dated August, 1917.
4. Bessie Fink, dated January 23, 1919.
5. Menger, Ring & Weinstein, Inc., beginning May 1, 1919, and an oral lease from month to month of part of basement in Nos. 304, and 306 West 42nd Street.
6. E. Leins Piano Co., dated March —, 1919.

Subject also to the state of facts shown on the survey of the [fol. 213] said premises made by Earl B. Lovell, Civil Engineer and City Surveyor; 160 Broadway, New York, dated February 8, 1921.

Subject also to a purchase money second mortgage for \$60,000 made by the party of the second part to Martin Vogel and Edwin C. Vogel, given to secure a part of the purchase price paid herefor and intended to be recorded simultaneously herewith.

together with the appurtenances and all the estate and rights of the parties of the first part in and to said premises.

To have and to hold the premises herein granted unto the party of the second part, its successors and assigns forever, subject, however, as aforesaid.

And said parties of the first part covenant as follows:

First. That said Heyman Vogel is seized of the said premises in fee simple, and has good right to convey the same;

Second. That the party of the second part shall quietly enjoy the said premises;

Third. That the said premises are free from encumbrances, except as aforesaid.

Fourth. That the parties of the first part will execute or procure any further necessary assurance of the title to said premises;

Fifth. That said parties of the first part will forever warrant the title to the said premises.

In witness whereof, the parties of the first part have hereunto set their hands and seals the day and year first above written.

Heyman Vogel. (L. S.) Matilda Vogel. (L. S.)

In presence of Albert L. Fiorillo.

(Revenue Stamps amounting to \$160 attached.)

[fol. 214] STATE OF NEW YORK.

County of New York, ss:

On the 4th day of May, nineteen hundred and twenty-one, before me came Heyman Vogel, and Matilda Vogel his wife, to me known to be the individuals described in, and who executed, the foregoing instrument, and acknowledged that they executed the same.

Albert L. Fiorillo, Notary Public. Bronx Co. No. 84. Reg. No. 2281. Cert. Filed in N. Y. Co. No. 466. Reg. No. 2350. Term expires March 30, 1922.

The land affected by the within instrument lies in Section 4 in Block 1032 on the Land Map of the County of New York.

Recorded at Request of Herman Goldman, 120 Broadway.

Recorded in the Office of the Register of the County of New York on May 5, 1921, at 3.50 P. M. in Liber 3223, page 102 of Conveyances and indexed under Block Number 1032 on the "Land Map of the County of New York."

Witness my hand and Official Seal.

James A. Donegan, Register. Edmund P. Holahan, Deputy Register.

[fol. 215]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT B IN EVIDENCE

Defendants' Exhibit B is a lease dated April 20th, 1916 between Heyman Vogel, as landlord, and James Duignan, as tenant, both of New York County, the important provisions of which are as follows:

"That the landlord has let, and by these present does grant, demise and to farm let unto the said Tenant, and the said Tenant does hereby hire and take from the Landlord, that portion of the building situated on the southwest corner of 42nd Street and Eighth Avenue, shown on the diagram annexed hereto marked "Schedule A," being approximately twenty-four (24) feet in width on Eighth Avenue, and approximately fifty-three (53) feet in depth on 42nd Street, with a space in the rear of building 655 Eighth Avenue approximately fourteen (14) feet in width and sixteen (16) feet in length, together with the basement under 655-657 Eighth Avenue, being approximately fifty (50) feet by fifty (50) feet; and also the three floors above 655-657 Eighth Avenue, each of which is approximately forty-nine (49) feet wide by fifty-three (53) feet deep, for and during the term of nineteen (19) years and eleven months from the 1st day of June, 1916 to the 30th day of April, 1936 at the rent or sum of Twelve thousand five hundred (\$12,500) dollars per annum for the first two years, and at the rent or sum of Fourteen thousand (\$14,000) dollars per annum for the balance of the term, the rent for the month of June to be paid on the signing of this lease, and the rent thereafter to be paid monthly in advance on the first day of each and every month, i. e., during the first two years, the sum of \$1,041.66 per month, and during the balance of the term the sum of \$1,166.67 per month. * * *

Landlord consents that the demised premises may be used by [fol. 216] tenant as and for a men's Cafe and Hotel for Men, and it is agreed that said premises shall not be used for any other purpose, unless consented to in writing by the landlord.

As a further consideration for entering into this lease, Tenant agrees to supply steam heat and free of charge to the stores in premi-

ises 655 Eighth Avenue adjoining on the south, from October 15th to May 1st in each year.

And the parties to these presents mutually covenant and agree as follows:

Third. The Tenant agrees to take good care of the demised premises, both inside and outside, including the roof, as the same now are, or may hereafter be altered or improved, and of the plumbing and appurtenances, and to make all repairs in and upon the same, and on the exterior thereof, and to keep the said demised premises, plumbing and appurtenances in first class order, condition and repair during the said term, at his own expense; and if Tenant shall fail to repair the said premises as hereinbefore provided, or fail to put the same in good order or repair within thirty days after demand, the Landlord may, at his option, repair the same, and Tenant shall be obligated to repay the landlord the cost and expense thereof, and the amount so paid shall immediately become due and payable to the Landlord by Tenant as additional rent, or, the Landlord may at his election, terminate this lease upon the notice and in the manner hereinafter provided in paragraph Thirteenth of this lease.

Fourth. The Tenant shall not make any improvements, additions or alterations in, to or upon the said demised premises without the written consent of the Landlord, and in addition to such other rights and remedies as the Landlord may have, in law or in equity, [tol. 217] the Landlord shall have the right to enjoin the making of any improvements, additions or alterations without his written consent, and shall have the right to terminate this lease, in the event of any breach of this covenant, and to dispossess the tenant, as hereinafter in paragraph Thirteenth provided. * * *

Fifth. The Tenant shall promptly execute and comply with all rules, orders, ordinances, regulations and requirements applicable to said premises, of the authorities of the State, County and City of New York, and of the Borough of Manhattan, or any of them, and of any and all of their departments and bureaus, at his own cost and expense, and tenant shall also promptly comply with and execute all rules, orders and regulations of the New York Board of Fire Underwriters, the New York Fire Insurance Exchange and the Fire Prevention Bureau, or any of them, at his own cost and expense. If the Tenant shall fail to comply with any such rules, orders, ordinances, regulations or requirements above referred to within thirty days after notice, the Landlord may comply with same, and Tenant shall be obligated to repay to him the cost and expense thereof, and any penalty that may be imposed upon the Landlord by reason of the failure to comply therewith, and the amount thereof may be added to the rent next due, or the landlord may, at his election, terminate this lease upon the notice and in the manner hereinafter provided in paragraph thirteenth of this lease.

Sixth. The Tenant will not assign or mortgage, except to a reputable brewer, this lease for the term thereof or any part thereof, and

will not let or underlet the said demised premises, or any part thereof, nor use or permit the same to be used for any purpose other than such as may be consented to in writing by the landlord as above [fol. 218] stated, except that the Tenant may, without the written consent of the Landlord sublet such booths on the demised premises for business purposes as are usually connected with and forming a part of a liquor store and saloon business, nor occupy or use the said premises, or permit them to be used or occupied in any way deemed extra hazardous on account of fire or otherwise, without the written consent of the landlord, nor use or permit the same to be occupied or used for any purpose prohibited by any existing or future law, ordinances or regulations.

Seventh. Tenant will not permit anything to be done in the premises that will in any way injure the premises, nor bring or keep anything therein which shall in any way increase the rate of fire insurance or any of the buildings, or which shall conflict with the regulations of the Fire Department or the Fire Laws, or with any insurance policy upon the building or any part thereof. If by reason of any act or neglect of Tenant, any fire insurance company shall cancel any policies covering said premises, or any part thereof, the Landlord may, at his election, forthwith terminate this lease upon the notice and in the manner hereinafter, in paragraph Fourteenth of this lease, provided * * *

Thirteenth. It is agreed by and between the parties hereto that if default shall be made in the payment of rent, or any part thereof, when the same becomes due, or in case of any breach of any of the other covenants, conditions or stipulations in this lease contained (except the covenants with respect to compliance with the rules, orders and regulations of the City and other departments contained in paragraph Fifth hereof and except the covenant to repair contained in paragraph Third hereof) and if the tenant shall have failed to comply with any of the said covenants, conditions or stipulations (except those contained in paragraph Fifth hereof, and except the said covenant to repair) within ten days from and after written notice to them by the Landlord of any such breach or default, or if the said premises, or any part thereof shall be vacated or abandoned by the tenant during the said term, then the landlord shall have the right, at his election, to terminate this lease on first giving to tenant three days' notice of such election, and thereupon this lease, and the term hereby granted, and all right and interest of the said tenant hereunder, shall cease and expire, at the expiration of the said three days, in the same manner and to the same effect as if that were the expiration of the term of this lease. And it shall thereupon be lawful for the landlord, or his representative, to recover possession of and to re-enter the said premises either by force, or by means of summary proceedings or action of ejection, or otherwise, and to remove therefrom the tenant or other occupant thereof, without being liable to prosecution therefor; and in such case the tenant shall and will pay, or cause to be paid to the landlord, as damages for such default or breach, the difference between the amount of rent that would have been payable during

the residue of the original term, if this lease had continued in force, and the net rent for such residue realized by the landlord by means of reletting to other parties, after deducting the expense of the landlord in recovering possession and reletting, and any cost or expense that he may be put to for repairs or alterations, or by reason of any condition or covenant being unfilled on the part of the Tenant, which reletting may be for the whole of the residue of the original term or for portions thereof from time to time, and may be for the whole premises or portions thereof from time to time, as opportunity may offer, and as the Landlord may deem expedient, and the [fol. 220] Tenant shall and will pay to the Landlord such difference in equal monthly payments as the amount of such difference shall from time to time be ascertained. The Tenant for himself and all persons claiming under him, expressly waives all right to redeem the said premises after a warrant of dispossess shall have been issued, or after a judgment in an action for ejectment shall have been made and rendered. And the landlord agrees to give the mortgagee of this lease at least ten days' notice of the breach of any of the terms and conditions of the lease on the part of the tenant before he institutes summary proceedings to dispossess said Tenant. * * *

Sixteenth. It is further agreed that the waiver by the Landlord of any breach of any of the provisions, covenants or conditions of this lease shall be limited to the particular instance, and shall not be deemed to waive any future breach of such provisions, covenants or conditions.

Twenty-second. The Tenant agrees to, and does hereby indemnify and save harmless the landlord from any liability that may occur on account of said Tenants renting said premises for the sale of intoxicating liquors, and from any liability that may arise by virtue of any civil damages that may be suffered by reason of any intoxicated person or persons receiving any liquors from said Tenant, or any person under him, and from any liability that may occur on account of the provisions of the statute, section 39 of the Liquor Tax Law, or any liability that may occur on account of any violation of any requirement or provisions of said Liquor Tax Law or otherwise; and, in case of any liability on account of any illegal sales of intoxicating liquors, or any liability for damages suffered under and by virtue of such law, or any law rendering said Land-[fol. 221] lord liable for damages under the civil damage act, or otherwise, then and in that case, the Tenant will save said Landlord harmless.

Twenty-third. The Tenant hereby covenants and agrees to comply in all respects with the provisions of all present and future laws relating to the traffic in or sale of liquors, and the taxation and regulation of the same, or the regulation of the use and occupation of the demised premises, and to promptly execute and comply with any and all rules, orders and regulations of the State Commissioners of Excise, and of any and all other officers, bureaus and departments of the Borough of Manhattan, and the City, County and State of New York with respect to any of the foregoing matters. * * *

Twenty-sixth. It is agreed that the covenants contained in the within lease are binding on the parties hereto and their legal representatives and assigns.

In witness whereof, the parties hereto have hereunto signed their names and affixed their seals the day and year first above written.

In the Presence of:

Heyman Vogel. (L. S.) James Duignan. (L. S.)"

This lease is duly acknowledged by both parties.

[fol. 222]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT C IN EVIDENCE

Defendants' Exhibit C is a lease bearing date July 27th, 1916, between Heyman Vogel, as Landlord, and James Duignan, as Tenant, both of the County of New York, whereby the landlord let to the tenant a portion, four (4) feet six (6) inches in width, by approximately forty-nine (49) feet in depth of the southerly part of the store floor of premises known as 655 Eighth Avenue, immediately adjoining the wall of the theatre exit passage of premises 653 Eighth Avenue, to be used as an exit passage or for such other purposes not more hazardous than a men's cafe as Tenant may desire. If Tenant constructs a mezzanine passageway through this exit passage, the space underneath said mezzanine passageway is reserved to the landlord, to be used in conjunction with the remainder of the store floor of premises 655 Eighth Avenue by the landlord, or by any tenant to whom he may lease such remainder of such store floor. There is no partition dividing off this four foot six inch strip from the remainder of the store 655 Eighth Avenue, and it is agreed that Tenant will forthwith build the necessary walls separating this strip from the remainder of the store floor 655 Eighth Avenue, or if mezzanine passage is erected, in such manner as to reserve to the landlord the portion of the demised premises under the mezzanine floor; for and during the term of nineteen years and nine months from the first of August, 1916, to the 30th of April, 1936, at the rent of \$600 per annum, payable monthly in advance on the first of each month.

This lease contains substantially the same terms and provisions as the previous lease of April 20th, 1916.

DEFENDANTS' EXHIBIT D IN EVIDENCE

At a stated term of the United States District Court held in and for the Southern District of New York, in the United States Courts and Post Office Building, in the borough of Manhattan city, county and state of New York, on the 3rd day of January, 1923

Present: Hon. John C. Knox, District Judge.

E. 23/326

UNITED STATES OF AMERICA, Complainant,

vs.

JAMES DUIGNAN, Otherwise Known as JAMES DEGNAN, and CLAUDE CAPPONI, Defendants

Decree

A bill of complaint having been filed herein and subpoena issued on April 25, 1922 and it appearing from the Marshal's return that said subpoena was duly served on the defendants James Duignan and Claude Capponi on April 27, 1922 and the said defendants not having appeared, having failed to file an answer or defense to said bill of complaint, and the time to answer having expired; and it further appearing that on the 24th day of June, 1922, the complainant herein duly entered an Order that the bill of complaint be taken pro confesso against the defendants James Duignan and Claude Capponi and that more than thirty days have elapsed since the entry of said Order, and that no further proceedings have been had or taken in said cause since said Order was entered;

Now, on motion of William Hayward, United States Attorney for [fol. 224] the Southern District of New York, Solicitor for Complainant, it is

Ordered, adjudged and decreed that that certain hotel known as Degnan Hotel, situated in the building located at numbers 655 and 657 Eighth Avenue, Borough of Manhattan, City and County of New York, in the Southern District of New York, was on February 15, 16, 17, 18 and 24, March 1 and 7, a common nuisance; and it is

Further ordered, adjudged and decreed that an injunction issue forthwith under the seal of this Court, enjoining the defendants James Duignan and Claude Capponi and each of them, their servants, agents, subordinates and employees and each and every one of them from manufacturing, selling, bartering or storing in said premises, or any part thereof, any liquor containing one-half of one per cent, or more, of alcohol by volume; and it is

Further ordered, adjudged and decreed that all intoxicating liquor heretofore seized on said premises be destroyed; or, upon the direction

of the United States Attorney shall be delivered to such department or agency of the United States Government as he shall designate, for medical, mechanical or scientific uses, or sold by the United States Marshall at private sale for such purposes to any person having a permit to purchase liquor; and the proceeds thereof covered into the Treasury of the United States; and it is

Further ordered adjudged and decreed that the United States of America, complainant herein, recover of the defendants James Duignan and Claude Capponi Thirty-two 68-100 Dollars costs as taxed, and that execution issue therefor.

Jno. C. Knox, U. S. D. J.

A true copy. Alex. Gilchrist, Jr., Clerk. (Seal of the District Court of the United States, Southern District of N. Y. A. G., Jr.)

[fol. 225]

IN UNITED STATES DISTRICT COURT
DEFENDANTS' EXHIBIT E IN EVIDENCE

Notice of Lien Against Property

Police Department, City of New York

Date: April 7th, 1922.

Pall Mall Realty Co., 627 Eighth Avenue.

DEAR SIR OR MADAM: This Department has been informed that you are the owner or authorized agent of the building situated at 657 Eighth Avenue, in the Borough of Manhattan, City of New York, a portion of which premises is occupied by James Degnan.

On the 24th day of March, 1922, Claude Capponi was arrested for having in his possession on said premises a quantity of intoxicating liquor, to wit: Quantity alcoholic beverage.

Said defendant has been arraigned in court, held to answer, and the case is now pending.

Section 1214, Paragraph G, of Article 113 of the Penal Law of the State of New York, provides, in part, as follows:

* * * If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure or place is occupied or used for the manufacture or sale of such liquor contrary to the provisions of this article, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such Lien may be enforced by action in any court having jurisdiction.

Served Apr. 10/22.

Jos. A. Howard, Captain 23rd Precinct.

[fol. 226] IN UNITED STATES DISTRICT COURT
DEFENDANTS' EXHIBIT F IN EVIDENCE

Notice of Lien Against Property

Police Department, City of New York

Date: April 25th, 1922.

Pall Mall Realty Co., 627 Eighth Avenue.

DEAR SIR OR MADAM: This Department has been informed that you are the owner or authorized agent of the building situated at 657 Eighth Avenue, in the Borough of Manhattan, City of New York, a portion of which premises is occupied by James Degnan.

On the 24th day of April, 1922 James Degnan was arrested for having in his possession on said premises a quantity of intoxicating liquor, to wit: Selling 3 glasses intoxic. Liquor.

Said defendant has been arraigned in court, held to answer, and the case is now pending.

Section 1214, Paragraph G, of Article 113 of the Penal Law of the State of New York, provides, in part, as follows:

* * * If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure or place is occupied or used for the manufacture or sale of such liquor contrary to the provisions of this article, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure or place shall be subject to a Lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.

Jos. A Howard, Captain 23rd Precinct.

[fol. 227] IN UNITED STATES DISTRICT COURT
DEFENDANTS' EXHIBIT G IN EVIDENCE

To James Duignan, also known as James Degnan, tenant 655 Eighth Avenue, New York City:

Take notice that you having violated the terms and provisions of a certain lease made and entered into by you and bearing date April 20th, 1916, whereby you lease the premises known by the street number 655 Eighth Avenue, in the Borough of Manhattan, City of New York, and further, you having maintained in and upon the premises a store and hotel, wherein you have sold, given away, kept, or bartered intoxicating liquors in violation of Article 113 of the

Penal Laws of the State of New York, and particularly in violation of Sections 1212 and 1214-g therefor as well as in violation of the National Prohibition Act and particularly section 3 thereof; the undersigned, as Landlord, hereby gives notice that it exercises its option to terminate said lease and does hereby declare a forfeiture thereof, and that you are required, on or before the expiration of three (3) days from the date of the service of this notice, to surrender up possession of said premises to it, and in default of which, it will proceed under the Statute to recover possession thereof.

Dated New York, April 25th, 1922.

Yours &c., Pall Mall Realty Corporation, by Lawrence S. Bolognino, Landlord.

[fol. 228]

IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alex. Gilchrist, Jr., clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled action, as agreed upon by the parties.

In witness whereof, I have caused the seal of the said Court to be hereto affixed at the City of New York, in the Southern District of New York, this 4th day of August in the year of our Lord nineteen hundred and twenty-four, and of the Independence of the said United States the one hundred forty-ninth.

Alex. Gilchrist, Jr., Clerk.

[fol. 229]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated, that the foregoing is a true transcript of the record of the District Court of the United States for the Southern District of New York, in the above-entitled suit, as agreed upon by the parties.

Dated New York, July 21, 1924.

Wm. Hayward, U. S. Attorney, O'Connor & Donnellan,
Attys. for James Duignan, Leslie and Alden, Attys.
for Pall Mall Realty Co.

[fol. 230] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT

Before Hon. Henry Wade Rogers, Hon. Charles M. Hough, Hon.
Learned Hand, Circuit Judges

United States of America, Complainant-Respondent,

vs.

JAMES DUIGNAN, Defendant-Appellant, and PALL MALL REALTY
CORPORATION, Defendant-Respondent

Appeal from Final Decree in Equity Entered in the District Court
for the Southern District of New York

OPINION

The Realty Co. above named is the owner and Duignan the tenant, under a lease antedating National Prohibition, of certain premises in New York City suitable for, and under the lease once lawfully used for a hotel, restaurant and bar-room or cafe.

When the dispensing of intoxicating liquor became unlawful in the way previously pursued, Duignan continued the renting of [fol. 231] rooms and furnishing of food and sold ostensibly "soft drinks." The premises leased are in a busy and frequented portion of the City, the lease was valuable, and had years to run, and there is evidence that the owner desired to regain possession of the leased land.

Duignan was shown to have been enjoined under the "Volstead Act" before this suit began, and sundry assistants at his restaurant-hotel had been convicted of there selling liquor. His lease contained a covenant that he would "comply in all respects with the provisions of all present and future laws relating to the traffic in or sale of liquors."

The present suit was brought to abate a nuisance existing on Duignan's premises by his there "habitually, continually and recurrently" selling and keeping for sale liquor forbidden by Title II of said statute; such abatement to take the form of physically preventing the use of the premises for one year (Secs. 21 and 22).

Duignan and an employee of his were the only defendants originally named, but within a week after date of bill, the owner Realty Co. was made a defendant. Duignan by answer denied that a statutory nuisance existed, Realty Co. admitted its existence, but denied that such existence was with its own knowledge, consent or acquiescence.

Realty Co. then filed what it calls a "cross bill for affirmative relief" [fol. 232] against Duignan alleging that he was maintaining a statutory nuisance on the leased premises, against the landlord's will and praying a decree "cancelling the lease" and declaring the same forfeited pursuant to Sec. 23 of the statute, which provides that:

"Any violation of this Title upon any leased premises by the lessee or occupant shall at the option of the lessor work a forfeiture of the lease."

Duignan never answered this cross pleading, but tried the case on the issue of nuisance or no nuisance, after making a "motion for a jury trial" which was denied. At the close of evidence Duignan moved to dismiss on various grounds of which one was that "this proceeding is properly triable by a jury."

Decree entered closed the place for six months, declared cancellation of lease, directed Duignan to surrender possession to Realty Co. and the Marshal to remove him if such surrender was not made within five days.

From this Duignan appealed, assigning for error, (1) finding the existence of a nuisance, (2) sustaining the cause of action set out in the cross-bill and (3) denying a trial by jury.

George L. Donnellan for Duignan.

Warren Leslie for Realty Co.

Morris Streusand, Assistant U. S. Attorney.

Hotell, C. J.:

We shall not discuss the evidence tending to show that liquor was [fol. 233] sold in Duignan's place in such wise as to create a nuisance within the statute; the trial Court's ruling was quite within our decisions in *Wiggins vs. United States*, 272 Fed. 41, and *United States vs. Reisenweber*, 288 Fed., 520.

Exactly what appellant meant by his motion for a jury trial is not clear from the record. If his thought was to try before a jury the issue of nuisance, the motion had no foundation in law.

The applicable sections of the National Prohibition law have a long legal history. The legal concept of extending by legislative fiat the definition of a public nuisance to something theretofore legal, and the calling upon equity to abate it, is found in the Kansas statute of 1885, quoted by Harlan, J. in *Mugler vs. Kansas*, 123 U. S., 623, at 670; and is there expressed in a form distinctly more violent than are the nuisance sections of the Volstead Act. The thoroughness with which the Supreme Court upheld the Kansas method, has been the sustaining foundation of prohibitory legislation of sundry kinds for forty years, while as for jury trials, we quoted the rule in the *Reisenweber* case *supra* at p. 523; and it is that when the legislature constitutionally extends the definition of public nuisance to anything, such newborn nuisance, being created for destruction, may be destroyed without jury intervention.

If, however, Duignan's motion be thought to be confined to the case raised by the cross-bill, he was not in a position to make the [fol. 234] motion for he never answered or otherwise raised an issue with the Realty Co.

It is not doubtful that equity has jurisdiction to decree cancellation of written contracts, it is a quite distinct and rather extensive chancery field. Yet it may happen that entry thereupon must be

denied a plaintiff because he has an adequate remedy at law, and we shall now assume that Duignan deemed that Realty Co.'s cross-bill was equivalent to an ejectment or dispossession proceeding under the New York statute, where juries are of right.

If so, he was obliged by some pleading to raise the jurisdictional question. If he had answered on the merits and tried the case without denying jurisdiction, he would be concluded under *Southern Pacific Co. vs. United States*, 133 Fed., 651, and cases cited; and a fortiori is he concluded by trying the case fully while in default for want of an answer.

We are not unaware, that even had Duignan fully pleaded lack of jurisdiction in the District Court to try the cross-bill either with or without a jury, his contention has met with defeat in *Grossman vs. United States*, 280 Fed., 683, and *United States vs. Boynton*, 297 Fed., 261. The subject is interesting, but is not now before us.

Decree affirmed, with costs.

[fol. 235] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—Filed Feb. 9, 1925

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R., C. M. H.

[fol. 236] [File endorsement omitted.]

[fol. 237] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME

To the Honorable Henry Wade Rogers, Presiding Judge of the United States Circuit Court of Appeals for the Second Circuit:

Now comes the defendant-appellant by his solicitors, Davies, Auerbach & Cornell, and feeling himself grieved by the decree made and entered herein on the 9th day of February, 1925, affirming the decision of the United States District Court for the Southern District

of New York, which granted to the United States of America an order closing the defendant-appellant's premises for a period of six months and declaring a cancellation of his lease upon the cross bill of defendant-respondent, and directing defendant-appellant to surrender possession to the defendant-respondent and issuing a writ of assistance directing the Marshal to remove defendant-appellant if such surrender was not made within five days, and the United States Circuit Court of Appeals for the Second Circuit having made and entered a decree of affirmance, manifest error has intervened to the great damage of the petitioner, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal be allowed, and that citation issue, as provided by law, [fol. 238] and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States, at Washington, D. C.; that the jurisdiction of the Circuit Court of Appeals for the Second Circuit depended upon Sections 22 and 23 of Title II of the National Prohibition Act (Act of October 28, 1919, 41 ST. 305); that the amount involved herein and the matter in controversy exceeds the sum of One Thousand (\$1,000) Dollars besides costs, and this is not a case in which the jurisdiction of the United States Circuit Court of Appeals is made final by statute.

Wherefore, petitioner prays for an allowance of the appeal to the end that the cause may be carried to the Supreme Court of the United States, and petitioner prays for the issuance of a citation and such other process as may be required to perfect the appeal prayed for to the end that the error therein may be corrected.

Davies, Auerbach & Cornell, Solicitors for Defendant-Appellant, Oflire & P. O. Address, 34 Nassau Street, Borough of Manhattan, New York City.

Appeal allowed and citation directed to be issued and bond fixed in the sum of Two hundred fifty (\$250) Dollars conditioned as the law directs, this 1 day of May, 1925.

Henry Wade Rogers, Judge United States Circuit Court of Appeals for the Second Circuit.

[fol. 239] IN UNITED STATES CIRCUIT COURT OF APPEALS

ASSIGNMENT OF ERROR—May 1, 1925

Now on this 1st day of May, 1925, comes James Duignan, defendant-appellant, by his solicitors, Davies, Auerbach & Cornell, and respectfully says that the decree entered in the above named cause on the 9th day of February 1925, is erroneous and unjust to the defendant-appellant in the following respects:

1. The Court erred in affirming the decree of the United States District Court for the Southern District of New York.

2. Under Section 23 of Title II of the National Prohibition Act, the United States District Court for the Southern District of New York had no power or jurisdiction to declare a forfeiture of the existing leases in the suit of the Pall Mall Realty Corporation.

3. Under Section 23 of Title II of the National Prohibition Act, the United States District Court for the Southern District of New York had no jurisdiction, sitting as a court of equity, to declare a forfeiture of the existing leases in the suit of the Pall Mall Realty Corporation.

[fol. 240] 4. The United States District Court for the Southern District of New York had no jurisdiction to entertain the so-called cross-bill served by the Pall Mall Realty Corporation.

5. The United States District Court for the Southern District of New York had no jurisdiction to enter a decree upon the so-called cross-bill served by the Pall Mall Realty Corporation, declaring a forfeiture of the existing leases by that corporation to James Duignan.

6. Section 23 of Title II of the National Prohibition Act has no application to leases such as the leases involved in this suit, made prior to the enactment of that section.

7. The District Court and the Circuit Court of Appeals have each respectively erred in interpreting Section 23 of Title II of the National Prohibition Act as mandatory and as preventing the exercise of discretion.

8. The courts below have erred in holding that the Eighteenth Amendment to the Constitution of the United States delegated to the Congress the power to confer upon a landlord the right to cancel a lease because of the commission on the premises of an offense against the Prohibition Act.

9. The courts below erred in holding that James Duignan was not entitled to a jury trial of the issues framed by the bill of complaint and his answer thereto.

10. The courts below erred in holding that James Duignan was not entitled to a jury trial as to the issues tendered by the so-called cross-bill of the Pall Mall Realty Corporation.

11. The courts below erred in holding that the alleged cause of [fol. 241] action pleaded in the cross bill of the Pall Mall Realty Corporation was one of which the United States District Court for the Southern District of New York had jurisdiction under and by virtue of Section 24 of the Judicial Code.

12. The courts below erred in holding that the forfeiture provision of Section 23 of Title II of the National Prohibition Act was not unconstitutional.

13. The courts below erred in holding that the question of the jurisdiction of the United States District Court for the Southern

District of New York to entertain the bill of complaint was not presented, and was not before the court for determination.

14. The courts below erred in holding that the question of the jurisdiction of the United States District Court for the Southern District of New York to entertain the cross bill was not presented and was not before the court for determination.

15. The courts below erred in holding that the alleged failure of James Duignan to serve an answer to the so-called cross bill, or otherwise raise an issue with reference thereto, left him no right to demand a jury trial as to the subject-matter of the said cross bill.

16. The courts below erred in holding that there was evidence justifying a decree forfeiting the leases.

17. The courts below erred in holding that there was evidence justifying a decree declaring the existence of a nuisance.

18. The courts below erred in holding that the motion made [fol. 242] by James Duignan for a jury trial should be denied.

19. The courts below erred in holding that James Duignan waived any right which he had to a jury trial.

20. Under the laws and Constitution of the State of New York, James Duignan had a right to a jury trial in any action or proceeding to forfeit the existing leases under which he was a tenant. The Congress had no power to deprive James Duignan of such right.

21. By section 23 of Title II of the National Prohibition Act, the Congress did not intend to deprive a tenant of any procedural right which such tenant would have under the laws of the State where the real property was situated.

22. The courts below overlooked the well established rule of equity, that equity will relieve against forfeitures but will not enforce them; and they erred in placing a construction upon section 23 of Title II of the National Prohibition Act which vested courts of equity with jurisdiction to declare a forfeiture.

23. The courts below erred in making a decree which, by placing the construction which they did upon section 23 of Title II of the National Prohibition Act, enforced a penalty for an alleged violation of law which was excessive, cruel and unusual, and, as such, unconstitutional.

24. The provisions of section 22 of Title II of the National Prohibition Act are unconstitutional, in that they deprive the defendant [fols. 243 & 244] of the right to trial by jury, destroy the distinction between law and equity, deprive the defendant of due process of law and equal protection of the laws, and deprive the defendant of property without compensation, and are beyond the powers dele-

gated to Congress and constitute an invasion of the rights of the States.

Davies, Auerbach & Cornell, Solicitors for Defendant-Appellant.
Office & Post Office Address: 34 Nassau Street, Borough of Man-
[fols. 245 & 247] hattan, New York City.

BOND ON APPEAL FOR \$250.00—Approved May 1, 1925; omitted in
printing

[fol. 248] IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 247, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States, Plaintiff-Appellee, v. James Duignan (Degnan), Defendant-Appellant, Claud Company and Pall Mall Realty Corporation, Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of May in the year of our Lord One Thousand Nine Hundred and twenty-five and of the Independence of the said United States the One Hundred and forty-ninth.

Wm. Parkin, Clerk. (Seal of the U. S. Circuit Court of Ap-
peals, Second Circuit.)

[fols. 249-252] CITATION—In usual form, showing service on
Laurence S. Bolognino et al.; omitted in printing


Endorsed on cover: File No. 31,128. U. S. Circuit Court of Ap-
peals, 2nd Circuit. Term No. 422. James Duignan, appellant, vs.
The United States of America and Pall Mall Realty Corporation.
Filed May 7th, 1925. File No. 31,128.

POSTPONED TO MERITS

JUN 1 - 1925

No.  4  101

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM— 1925

JAMES DUIGNAN,

Petitioner,

against

UNITED STATES OF AMERICA,
PALL MALL REALTY CORPORATION,

Respondents.

PETITION AND BRIEF FOR WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

DAVIES, AUERBACH & CORNELL,
Solicitors for Petitioner.

CHARLES H. TUTTLE,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1924.

JAMES DUGNAN (DEGNAN),
Petitioner,

against

UNITED STATES OF AMERICA, PALL MALL
REALTY CORPORATION,
Respondents.

To:

EMORY R. BUCKNER, ESQ.,
United States Attorney.

LESLIE & ALDEN, ESQS.,
Solicitors for Respondents.

PLEASE TAKE NOTICE, that upon a certified transcript of the Record herein and upon the annexed petition and brief thereto attached, the undersigned, on behalf of the above-named petitioner, will present the annexed petition for a Writ of Certiorari to the Supreme Court of the United States, at the Capitol, in the City of Washington, D. C., on Monday, May 25, 1925, at the opening of Court on that day or as soon thereafter as counsel may be heard, and will ask for the relief prayed therein, and for such other and further relief as in the premises may be just.

Dated, New York, May 6th, 1925.

DAVIES, AUERBACH & CORNELL
~~CHARLES H. TUTTLE, ESQ.~~
Solicitor for Petitioner,
34 Nassau Street,
New York City.

RECEIVED a copy of the foregoing Notice, together with the Petition for Writ of Certiorari and Brief referred to therein, this

day of May, 1925.

.....
United States Attorney.

.....
Solicitors for Respondent, Pall
Mall Realty Corporation.

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Supreme Court of the United States

OCTOBER TERM, 1924.

JAMES DUIGNAN (Degnan)

Petitioner,

against

UNITED STATES OF AMERICA,
PALM MALL REALTY CORPORATION

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, James Duignan, respectfully submits his petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Second Circuit in the above-entitled case.

The Circuit Court of Appeals has affirmed a judgment rendered in the District Court for the Southern District of New York, in an action by the United States of America against the petitioner under Section 22 of Title II of the National Prohibition Act to declare that a portion of certain premises occupied by the petitioner, as tenant, was a common nuisance.

Pall Mall Realty Corporation, landlord of said premises, answered in the action, and filed a "cross-bill" to cancel and to forfeit the leases under Section 23 of Title II of the Prohibition Act, and to oust the petitioner.

The Circuit Court of Appeals has held that the petitioner's demand for a jury trial was rightly denied and that the judgment of forfeiture and ouster on the "cross-bill" was proper.

The petitioner's leases had a little more than 12 years to run at the date of the District Court's judgment. The uncontradicted evidence was that this unexpired term was of the reasonable market value of \$250,000 or more (fol. 436 *et seq.*).

The Questions Involved and their Importance.

Briefly stated, the ultimate questions are these:

1. Under Section 23 of Title II of the National Prohibition Act has a Federal court of equity power and jurisdiction to declare a forfeiture of an existing lease at the suit of the landlord?
2. Since, under the constitution and laws of the State of New York, a forfeiture of an existing lease can be adjudicated only after trial by jury, could Congress constitutionally deprive the citizens of that State of that right?
3. Did the Eighteenth Amendment delegate to Congress the power to confer upon a landlord the right to cancel a lease because of the commission on the premises of an offense against the Prohibition Act?
4. Has a Federal Court (in the absence of a diversity

of citizenship) any jurisdiction to enforce a forfeiture under Section 23 of Title II of the National Prohibition Act?

5. If so, is the Federal Court bound to recognize the right of jury trial applicable to such actions in the state courts?

6. Can Section 23 of Title II have any application to leases made *prior* to the enactment of the section?

7. Was the Trial Court right in interpreting Section 23 of Title II as **mandatory** and as **depriving it of discretion**?

The far-reaching importance of these questions is obvious. As far as we can ascertain none of them has as yet been determined by this Court. They necessarily involve constitutional considerations of the utmost gravity. Proceedings by the Government to "padlock" premises where offenses against the Prohibition Act are charged to have been committed, are on the increase. The use of such proceedings by landlords to secure, by way of a cross-bill, a forfeiture of the lease itself is novel; and the decisions below sustaining this device have far-reaching consequences and involve important principles of constitutional law, particularly where (as here) the lease antedates the Prohibition Act.

Procedure for Review.

Petitioner is advised and believes that this is a case in which an appeal will lie to this Court from the decree of the Circuit Court of Appeals under Section 241 of the Judicial Code. In order, however, to avoid the possibility,—since the Prohibition Act contains criminal as well as civil provisions, and provisions which may be put into either of these categories,—of being met with the conten-

tion that an appeal does not lie, petitioner is proceeding by way of this application as well as by appeal. See *United Drug Co. v. Rectanus Co.*, 248 U. S. 90, 93; and *Spiller v. Atchison, etc., Ry. Co.*, 253 U. S., 117, 120.

The Pleadings and Judgment.

The petitioner was occupant of the basement, ground floor and three upper stories of premises 655-657 Eighth Avenue, Manhattan, New York City, under a lease and supplemental lease (Defendants' Exhibits "B" and "C," at fol. 643 *et seq.*) which provided that the premises should be "used as and for a Men's Cafe and Hotel for Men * * *." The Government's complaint alleged *only that the saloon portion of the premises* (fol. 28), "located on the ground floor and in the basement of the building," was a nuisance, and confined its prayer for abatement to that portion of the premises.

The original complaint did not make Pall Mall Realty Corporation a party. Thereafter the complaint was amended by adding the Realty Corporation as a party defendant. The Realty Corporation answered, admitting the alleged violations of the Prohibition Act by Duignan, but denying knowledge thereof or consent thereto; and by way of a "cross-bill" against Duignan alleged that the *entire* premises, both saloon and hotel, were a common nuisance within the meaning of the statute and asked for judgment cancelling and forfeiting petitioner's leases under Section 23, and directing that the petitioner "be ousted from said demised premises and that the said demised premises be repossessed by defendant Pall Mall Realty Corporation" (fol. 67).

The Government's allegation of nuisance and prayer for relief were never amended. Nevertheless, the Dis-

trict Court made its "padlock" decree to apply to both the saloon and the hotel, and entered judgment on behalf of the landlord upon its cross-bill that the petitioner's leases "be and the same hereby are forfeited and cancelled," and that within five days after the service of the judgment (fol. 15):

"the said defendant James Duignan vacate, surrender and deliver possession of said premises to the owner in fee thereof, the defendant Pall Mall Realty Corporation; that in default of such removal a writ of assistance issue forthwith out of this court, by the clerk thereof, directed to the United States Marshal for the Southern District of New York to remove the said James Duignan from the premises and deliver possession thereof to the owner in fee thereof, Pall Mall Realty Corporation."

The Trial.

The trial, both of the Government's complaint and of the Realty Corporation's cross-bill, was had on the Equity side of the Court. The petitioner objected at the very outset of the Realty Corporation's case to the admission of any evidence in support of the Realty Corporation's cross-bill (fol. 378), but was overruled, and duly excepted.

The petitioner also moved for a jury trial (fol. 70), but his motion was denied by the Court (fol. 123). This was duly assigned as error (fol. 19).

At the end of the entire case, the petitioner again attacked the constitutionality of an interpretation of the forfeiture provision of Section 23 which would permit the landlord to procure forfeiture of the lease and ouster of the tenant by cross-bill in an equity action and without

jury trial, and moved anew to dismiss the landlord's cross-bill,—upon all of which points, however, he was overruled by the Court (fol. 600, *et seq.*).

The Facts and the Equities.

The premises in question are the Southwest corner of 42nd Street and Eighth Avenue in New York City (fol. 451). The petitioner's lease was for a term of 19 years and 11 months from June 1, 1916 to April 30, 1936, at a rent of \$12,500 per year for the first two years, and of \$14,000 per year for the balance of the term (fol. 644, *et seq.*). *Thus the lease was made before the adoption of the Eighteenth Amendment.*

It was testified on the trial, without contradiction, that at the time of the trial the annual rental value of the premises was \$39,000 a year,—thus exceeding the rental stipulated in the lease by \$24,400 per year (fol. 437).

The petitioner's testimony showed, without contradiction, that before going into possession, he had expended \$62,500 in fitting the premises for use (fol. 456).

The lease provided that the premises should be used by the petitioner "as and for a Men's Cafe and Hotel for Men," and that the premises should "not be used for any other purpose, unless consented to in writing by the landlord" (fol. 646).

The interpretation placed upon this provision by the landlord itself was that it "prohibits the use of the leased premises for any purpose other than a hotel *and saloon*" (fol. 97).

The uncontradicted evidence was that in 1919, and long before any alleged violation of the Prohibition Act, the petitioner procured a sub-lessee for the entire premises, National Drug Store Company, and entered into a lease

with that Company, subject to the landlord's approval. The landlord, however, unconditionally refused to give such approval. The petitioner had the following conversation—not denied or contradicted—with the vice-president of the landlord (fol. 462, *et seq.*):

"I asked him to let me put in some other business in the place. He said, 'No, we will get much more money for the corner.' I says, 'Well, I got the lease,' and he says, 'Yes, you got the lease, but you got a cheap lease,' and I says, 'But I spent a lot of money on this place and you are depriving me from renting this place to the National Drug Stores Company,' and he says, 'We won't let you sublet it.' Then I made an appointment to go down to the Pall Mall Realty Company, and asked them to let me put some other business in, and they refused unless I paid an exorbitant rent."

Thereupon the petitioner sought the landlord's permission to remove the saloon fixtures and to fit the premises up as a cafeteria. This, again, was unconditionally refused. The petitioner had a conversation,—which was again not denied or contradicted,—with the same officer of the landlord, on this point (fol. 469, *et seq.*):

"Q. 39. You then had a conversation with Mr. Polognow in regard to altering the fixtures so as to make a cafeteria in the premises? A. Yes, sir.

"Q. 40. When did you have that conversation? A. Shortly after that I said, 'I want to put a cafeteria in here.'

"Q. 41. Did you tell him you wanted to rip out the old bar fixtures? A. Yes, sir, I told him I wanted to rip out the old bar fixtures and change it into a cafeteria, and he said, 'We won't let you do anything with it.'

"Q. 42. What did he tell you your clause in the lease was? A. That it was for a hotel and restaurant and I can't make any alterations without the written consent which is called for in the lease.

"Q. 43. Not without the written consent called for in the lease? A. No.

"Q. 44. Did you ask him to give a written consent of the Realty Company for the alterations? A. Yes, sir.

"Q. 45. What did he say? A. He wouldn't do it."

On the trial, the petitioner offered, in open court, to remodel the premises into a cafeteria and to remove all fittings having to do with the sale of liquor, if the landlord would give its consent (fol. 610). This the landlord refused, in open court.

Thereupon the petitioner offered, in open court, to stipulate that the petitioner would go out of the premises and would relet them "to a clothing store or drug store or any other line of business" having nothing to do with possible violations of the Prohibition Act, and asked the consent of the landlord, in open court, to this arrangement "as a matter of equity" (fol. 617, *et seq.*). This the landlord again refused to do.

The Government's affirmative case showed that at the very time the landlord was refusing to permit the petitioner to sublet the premises or to relet them for other than saloon purposes, the landlord was employing detectives to obtain evidence of violations of the Prohibition Act, and was going so far as to maintain private detectives, in the guise of guests, at the petitioner's hotel for that purpose (fols. 412; 383; 484). Indeed, the case against the petitioner rests preponderantly upon the testimony of these private detectives, "planted" by the landlord for the express purpose of obtaining such evidence.

The petitioner made the point on the trial that even if the matter were one properly cognizable in a court of equity, the landlord was not entitled to relief because it was itself persistently refusing to do equity; and the petitioner offered evidence in support of this defense. Of this offer the Court said (fol. 426) :

"I would like to take it, as far as that is concerned, but it seems this provision of the statute is mandatory."

At a later point in the trial the Court said further concerning this aspect of the case (fol. 603) :

"It does seem, I am quite free to admit, that this lease is of such character that it is somewhat harsh perhaps to cancel it absolutely, running, as it does, for a great many years."

The Conflict in the Decisions.

Section 22 of Title II of the Prohibition Act, under which the Government was proceeding, provides :

"Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases."

Section 23 of the same title, under which the landlord was proceeding, provides :

"Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease."

There is nothing in Section 23 or anywhere else in the Act indicating in what courts or by what proceedings such

a forfeiture shall be adjudged, or that such section is intended to operate upon prior leases.

In only three reported cases, so far as this petitioner is apprised, has the question of procedure under this section been passed upon by the courts. The result has been a conflict.

In *Grossman v. United States*, 280 Fed. (C. C. A., 7th Circuit), 683, the Court did not discuss the constitutionality or correctness of an interpretation of Section 23 of Title II which would invest a court of equity with the power to adjudge a forfeiture, but, apparently assuming that a Federal equity court had such power, held that a cross-bill for such relief could be properly entertained, because the subject-matter is germane to that of the original bill.

The Grossman case is, so far as this petitioner is apprised, the only decision by a Circuit Court of Appeals upon this point. The other two decisions are in the District Courts, and are clearly in conflict with each other.

United States v. Lot 29, etc., City of Omaha, 296 Fed., 729, is a decision by Judge WOODBROUGH of the District Court of Nebraska. There was no question before the Court in this case between landlord and tenant under Section 23, Title II; but upon the facts of the case the Court considered the constitutionality of both Sections 22 and 23 of Title II, and reached the conclusion that, whatever might be held in respect of such legislation when enacted by the States, it could not be sustained when enacted by the Federal Government. The Court said (p. 737):

"It seems to me of great importance that the constitutional question which is directly involved in this case should be presented promptly to the Supreme Court of the United States."

United States v. Boynton, et al., 297 Fed., 261, is a decision by the District Court in the Eastern District of Michigan. The Court relied solely upon the authority of the *Grossman case*; and, upon the same assumption which was made in the *Grossman case*, that the action of forfeiture could be entertained by a court of equity, the Court decided that the filing of a cross-bill was a proper practice, because germane to the main issue.

The Petitioner's Contentions.

FIRST.—The origin and history of the forfeiture provision of Section 23 of Title II show unmistakably that Congress had in mind at the time of its enactment the constitutional distinction in respect of jurisdiction between courts of law and courts of equity and the constitutional guarantee of the right to trial by jury in actions at law.

SECOND.—It is settled beyond any possible dispute, that under the Constitution and laws of New York, the defendant in an action for the recovery of real property is entitled to trial by jury, unless he has waived his right thereto in the manner prescribed by the New York statutes.

THIRD.—The forfeiture provision of Section 23 of Title II concerns only the rights of individuals in real estate. The procedure established by the several States in respect of such rights, governing their creation, tenure and termination, is binding upon the Federal Courts.

FOURTH.—There is nothing in the Eighteenth Amendment diminishing the reserved and exclusive right of the

several States to govern by local legislation the creation, tenure and termination of interests or estates in real property situated within their respective borders.

Nor is there any provision in the forfeiture clause of Section 23, Title II, which abrogates, or purports to abrogate, the statutes of the several States for the creation, tenure or termination of such rights.

Any interpretation of the forfeiture provision of Section 23, which undertakes to deprive a citizen of the State of New York of his right to a jury trial under the Constitution and statutes of that State in respect to his relation to his property, as regards another individual, condemns the provision as unconstitutional under the Tenth Amendment to the Federal Constitution.

FIFTH.—In the absence of any showing of diversity of citizenship, the District Court had no jurisdiction to try this so-called "cross-bill" between landlord and tenant.

SIXTH.—A construction of the forfeiture provision of Section 23 of Title II which deprives the defendant thereunder of the right to trial by jury condemns the provision as violative of the 7th Amendment to the Federal Constitution. Congress cannot be presumed to have intended such a result.

SEVENTH.—Whether the forfeiture provision of Section 23 of Title II be considered an action of ejectment, or of forcible entry and detainer, or of forfeiture of an estate in lands, or as a penalty for violation of the law,—and it can be but one or the other of these,—a construction of that provision which abolishes the established jurisdiction of the law courts in respect thereof, and seeks to transfer such jurisdiction to the equity side is violative

of Article III, Section 2, of the Federal Constitution, which requires Congress to recognize and maintain the distinction between cases in law and cases in equity.

EIGHTH.—In view of the established principle that equity will relieve from forfeitures but will not enforce them, it cannot be supposed that Congress intended to vest courts of equity with jurisdiction to enforce forfeitures under Section 23 of Title II,—particularly if the Section is to be construed, as apparently it was construed by the Trial Court, *as depriving the Court of discretion and as being mandatory*.

NINTH.—The leases in suit were executed April 20, 1916 and July 27, 1916, respectively. The Prohibition Act did not become a law until October 28, 1919.

The Act of Congress limits itself to legislating a new substantive covenant, by way of new ground for forfeiture, into these leases. It says nothing about *remedies* for breach, and was not intended to, and does not disturb the limitations contemplated by the parties when they executed these leases.

TENTH.—Section 23 of Title II does not operate retroactively. It does not affect leases made prior to its adoption; and under the constitution could not affect them.

ELEVENTH.—If the forfeiture provision of Section 23 of Title II can be construed as a criminal penalty for violation of the law, it is unconstitutional under the prohibition against excessive fines and cruel or unusual punishment.

TWELFTH.—The lack of jurisdiction of the Trial Court to try an action under the forfeiture provision of Section 23 of Title II was clearly raised and incorrectly decided.

Even, however, if the point had not been suggested in any manner, it was the duty of the Court, *sua sponte*, to recognize it and give it effect, and to dismiss the Realty Corporation's cross-bill for lack of jurisdiction.

United States of America, }
 State of New York, } ss.:
 County of New York, }

JAMES DUIGNAN, being duly sworn, deposes and says:

That he is the petitioner in the above entitled action; that he has read the foregoing petition and knows the contents thereof, that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JAMES DUIGNAN.

Sworn to before me, this 5th }
 day of May, 1925. }

FRANK C. TITUS,
 Notary Public.

United States of America,
Southern District of New York, } ss.:

CHARLES H. TUTTLE, being first duly sworn, deposes and says: *a member of the firm of Davis, Auerbach & Co*

That he is ^{and} the attorney for the petitioner named in the foregoing petition, by him subscribed as attorney for such petitioner; that he knows the contents of such petition, and the facts therein stated are true to his knowledge.

CHARLES H. TUTTLE.

Subscribed and sworn to before me, }
this 6th day of May, 1925. }

FRANK C. TITUS,
Notary Public.

I HEREBY CERTIFY that I have examined and read the foregoing petition for Writ of Certiorari, and in our opinion such petition is well-founded and should be granted by this Honorable Court, and that said petition is not filed for delay.

Dated, New York, May 6th, 1925.

Respectfully submitted,

CHARLES H. TUTTLE,
Of Counsel.

FIRST POINT.

The origin and history of the forfeiture provision of Section 23 of Title II show unmistakably that Congress had in mind at the time of its enactment the constitutional distinction in respect of jurisdiction between courts of law and courts of equity and the constitutional guarantee of the right to trial by jury in actions at law.

(1) Two classic differences of power between the several States and the United States are of controlling significance in this case:

In the first place, the States may, and generally do, dispense with trial by jury in cases of petty criminal offenses, but the Government of the United States is bound absolutely by the provisions of the Sixth Amendment that in *all* criminal prosecutions or proceedings in the nature of criminal prosecutions, without regard to the degree of the offense, the accused shall enjoy the right to trial by jury.

In the second place, the States may create new equitable rights in civil actions and provide remedies for their enforcement, thereby depriving the parties of their day before a jury; but the United States is bound absolutely by the provisions of the Seventh Amendment that in any suit at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, and by the provisions of Article III, Section 2 of the Federal Constitution, that the distinction between law and equity shall be maintained inviolate (see Sixth Point, pp. 27, *et seq.* of this brief).

If the forfeiture provision is criminal, quasi-criminal or penal in character, the United States is thus without

power to abrogate the right of jury trial thereunder, unless the Eighteenth Amendment is to be construed as, *pro tanto*, over-riding the provisions of the Sixth Amendment. (See Seventh Point, p. 33 of this brief.)

Whether the forfeiture provision of Section 23 of Title II is to be construed, therefore, as criminal or civil, the result must be the same, since in either event, Congress must be presumed to have enacted it with these limitations upon the power of the Federal Government in mind, and must be presumed to have intended that the right of defendants thereunder to trial by jury should be preserved.

(2) It thus becomes significant in the highest degree, that Section 23 seems clearly to have been taken from the Iowa statute, which preserves the right of jury trial, rather than from the statute books of one of the other States, following the contrary policy of abrogating that right. The only explanation can be that Congress had in mind its peculiar limitations of power in enacting this statute. See 58 Congressional Record, p. 2891, particularly the statement of Mr. Boies, of Iowa, a member of the Judiciary Committee of the 66th Congress, who defended this statute in the discussion in Congress upon the express precedent of the parent statute in his own State, Iowa.

The parent provision in the Iowa statute (Code of Iowa, 1924, Ch. 99, §2071) is as follows:

"Termination of Lease. Upon a violation of any provision of this title committed upon real estate occupied by a tenant, his agent, servant, clerk, employee, or anyone claiming under him, the landlord of such premises, by himself or agent, may, in writing, notify such agent, tenant, or the person

in possession of said leased premises, to the effect that he has terminated such lease and demands possession thereof within three days after the giving of such notice, and, after the expiration of said three days, may recover possession thereof *in an action of forcible entry and detainer*, without further notice to quit, upon proof of the violation of any provision of this title committed upon such real estate and of the giving of such notice." (Italics ours.)

It will be observed that the foregoing provision in the Iowa law gives precise definition to the action of the landlord as "an action of forcible entry and detainer." Such an action, without more, would be triable at law before a jury. (Section 8, Article I, Iowa Constitution.)

The intent of Congress, therefore, in going back to the State of Iowa, rather than to any other State, for Section 23 of Title II, can only have been to recognize and abide by the absolute duty upon Congress to preserve the right to trial by jury in such cases.

(3) A comparison of Section 22 and the abatement provision of Section 23 of Title II, with the forfeiture provision of Section 23, makes this intent even clearer. Section 22, which deals with abatement of nuisances, a recognized field of equitable jurisdiction and injunctive relief, provides expressly that the action therein contemplated "shall be brought and tried as an action in equity." The first paragraph of Section 23, which deals again with nuisances, provides expressly that persons guilty of a nuisance "may be restrained by injunction, temporary or permanent, from doing or continuing to do any of said acts or things." *The last paragraph of Section 23, however, which is the forfeiture paragraph, does not by any*

remotest suggestion undertake to provide that the action therein provided shall be had in a court of equity or shall be maintainable by injunctive procedure.

In an enactment so carefully drawn as the National Prohibition Act to avoid delays of criminal proceedings and of actions at law, by substituting wherever possible the summary proceedings of a court of equity, the mere fact that a particular provision does not, in terms, vest courts of equity with jurisdiction is almost sufficient of itself to lead to the conclusion that Congress did not intend that jurisdiction of such cases should be so vested.

SECOND POINT.

It is settled beyond dispute that under the Constitution and laws of New York the defendant in an action or counterclaim for the recovery of real property is entitled to trial by jury unless he has waived his right thereto in the manner prescribed by the New York statutes.

For many years the New York statute has continuously provided that issues of fact in an action of ejectment must be tried by a jury, unless a jury trial is waived (New York Civil Practice Act, Section 425); and even in the case of *summary proceedings* to recover possession of real property, the action is at law and the tenant is entitled absolutely to trial by jury. New York Civil Practice Act, Section 1428.

These statutes necessarily so provide, for the guaranty of trial by jury in the New York Constitution expressly preserves that right "in all cases in which it has been heretofore used."

The statutes of New York prescribe the manner in which trial by jury may be waived. Section 426 of the New York Civil Practice Act provides:

"A party may waive his right to the trial of the issue of fact by a jury, in any of the following modes:

"1. By failing to appear at the trial.

"2. By filing with the clerk a written waiver signed by the attorney for the party.

"3. By an oral consent in open court entered in the minutes.

"4. By moving the trial of the action without a jury, or, if the adverse party so moves it, by failing to claim a trial by a jury before the production of any evidence upon the trial."

The petitioner did not waive his right to a jury trial by any one of these four enumerated modes.

On the contrary, petitioner specifically demanded trial by jury (fols. 70, 87), and the refusal of the Court (fol. 123) was duly assigned as error (fol. 19). The motion for a jury trial, which was made by the petitioner (fols. 70-2) was such a motion as would have been properly made in the state court under like circumstances. The procedure in the state courts permits joinder of actions at law and in equity (New York Civil Practice Act, Section 258); and provides for the treatment of a counterclaim as though it were a separate trial of the issues thereby presented (New York Civil Practice Act, Section 424). Where a cause of action in equity is joined with one at law, or a legal counterclaim is interposed in an action in equity, the parties may move for and procure as of right a separate jury trial of the legal issues. This was precisely what the petitioner demanded in the District Court, which was bound to gov-

ern itself by the State procedure. *Arndt v. Griggs*, 134 U. S., 316, 321.

THIRD POINT.

The forfeiture provision of Section 23 of Title II concerns only the rights of individuals in real estate. The procedure established by the several States in respect of such rights, governing their creation, tenure and transfer, is binding upon the Federal Courts.

The property affected by the decree in this case is situated in New York State. The petitioner's leasehold interest therein was an estate in real property under the Laws of New York. Section 240 (4) of the New York Real Property Law declares:

"The terms 'estate' and 'interest in real property' include every such estate and interest, freehold or chattel, legal or equitable, present or future, vested or contingent."

The creation, tenure and termination of such estates are subject exclusively to the laws of the State. The United States has no power or jurisdiction in respect of such interests, or of their tenure, or of the law or procedure for their transfer or disposition.

Arndt v. Griggs, 134 U. S., 316, 321;

U. S. v. Fox, 94 U. S., 315, 320;

King, et al. v. American Transportation Co., 14 Fed. Case 511; Fed. Case No. 7,787;

M'Cormick v. Sullivant, 10 Wheaton, 192, 202;

Beauregard v. The City of New Orleans, et al., 18 How., 497;

Suydam v. Williamson, 24 How., 427;
Christian Union v. Yount, 101 U. S., 352;
Lathrop v. Bank, 8 Dana, 114.

The reservation of this jurisdiction to the several states *exclusively* has often been recognized by this Court.

In *Arndt v. Griggs*, 134 U. S., 316, 321, we read:

"The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. *The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the State, in this respect, is binding upon the federal courts.*"

FOURTH POINT.

There is nothing in the Eighteenth Amendment diminishing the reserved and exclusive right of the several States to govern by local legislation the creation, tenure and termination of interests or estates in real property situated within their respective borders.

Nor is there any provision in the forfeiture clause of Section 23, Title II, which abrogates, or purports to abrogate, the statutes of the several States for the creation, tenure or termination of such rights.

Any interpretation of the forfeiture provision of Section 23, which undertakes to deprive a citizen of the State of New York of his right to a jury trial under the Constitution and statutes of that State in respect to his relation to his property, as regards another individual, condemns the provision as unconstitutional under the Tenth Amendment to the Federal Constitution.

The forfeiture provision of Section 23 declares a *consequence* without pretending to establish any *procedure* for its enforcement. It provides that for a violation of Title II, a landlord may sue to procure a forfeiture of the lease; but it does not provide that he may sue in the Federal Courts, and the rule is well settled that "the right to sue does not imply a right to sue in the courts of the union, unless it be expressed." *Bank of the United States v. Deveaux*, 5 Cranch., 61, 86.

No one will claim that prior to the Eighteenth Amendment, Congress could have encroached upon the reserved, exclusive right of the several states to regulate the tenure

of real property within their limits and the modes of its acquisition, transfer and termination.

Authority for such encroachment must be found, if at all, in the second section of the Eighteenth Amendment, which gives concurrent power to the two sovereignties for the enforcement of the amendment. This Court has, however, already defined the significance of the concurrent power section in language which squarely condemns the interpretation put by the lower courts on the provision we are now considering. *National Prohibition Cases*, 253 U. S., 350, 387, where it was said:

"The power confided to Congress by that section, while not exclusive, is *territorially co-extensive* with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them."

In other words, its concurrent power enables Congress to go *into* the several states, from which it had theretofore been sternly excluded, and do acts for the purpose of enforcing the Eighteenth Amendment which theretofore would have been forbidden as matters solely of local and intrastate interest and jurisdiction. It does not and cannot give Congress a blanket authority to set up within each of the States a system of jurisprudence destructive of its established system and of its constitutional limitations. In the doing of acts intrastate, Congress still remains subject to the substantive and procedural limitations of state law. The object of the concurrent power provision was not to *destroy* state sovereignty, but as clearly said in the concurring opinion of Mr. Chief Justice

White (253 U. S., at p. 391), "to unite national and state administrative agencies in giving effect to the Amendment."

The test of any Congressional exercise of power is the same under the Eighteenth Amendment as under any other constitutional provision: Is the exercise of power appropriate or necessary to the accomplishment of the purpose? It was expressly so declared by Mr. Chief Justice White in the *National Prohibition Cases*, 253 U. S., at page 392, in which he limited the concurrent power of Congress "to the subjects *appropriate* to execute the Amendment as defined and sanctioned by Congress."

Surely, whatever may be said for the appropriateness or necessity of the *consequence* stipulated in Section 23, there is nothing to warrant in the slightest the contention that for the accomplishment of that consequence, it was necessary that a *procedure* should be adopted overriding the principle of law, "everywhere recognized, arising from the necessity of the case," that the creation, tenure and transfer of estates in land are subject exclusively to the laws of the state in which they lie. (*United States v. Fox*, 91 U. S., 315, 320.)

Especially should such a construction of the Congressional enactment be avoided, when there is nothing in the act which would suggest such an intent on the part of Congress.

It was so held again in *Spencer v. Duplan Silk Co.*, 191 U. S., 526, 530:

"But a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, or validity or construction of the laws or treaties of the United States, upon the determination of which the result depends, and which appears in the record by plaintiff's pleading."

(5) Clearly, also, this was not an action for the enforcement of a penalty or forfeiture within the meaning of Paragraph 9 of Section 24 of the Judicial Code.

In the first place, forfeiture is *in rem*. The *res* must be effectively seized *before* the proceeding can come into existence.

In *Dobbins's Distillery v. United States*, 96 U. S., 395, 396, this Court said:

"Judicial proceedings in rem, to enforce a forfeiture, cannot in general be properly instituted until the property inculpatcd is previously seized by the executive authority, as it is the preliminary seizure of the property that brings the same within the reach of such legal process."

In the second place, if Congress was using the word "forfeiture" in Section 23 in its usual acceptation under the Judicial Code, it would have provided machinery of seizure, either in an established and known form or according to some method laid down in the Act itself. In the present case, there was no preliminary seizure of the property. On the contrary, forfeiture was first declared by the decree, and seizure was directed to follow only in case the tenant did not vacate the premises.

Moreover, "condemnations and forfeitures are unknown in the practice of the United States courts, except upon specific proceedings against the property, and after the verdict of a jury." *The J. W. French*, 13 Fed., 916, 924; cited with approval in *In re Fassett*, 142 U. S., 479, 485.

In the third place, this cross-bill presents a purely private litigation between a landlord and his tenant.

In the fourth place, the cross-bill is not an action for the enforcement of a "penalty," because a penalty is a pecuniary mulct enforceable by an action of debt.

SIXTH POINT.

A construction of the forfeiture provision of Section 23 of Title II, which deprives the defendant therein of the right to trial by jury, condemns the provision as violative of the Seventh Amendment to the Federal Constitution guaranteeing trial by jury. Congress cannot be presumed to have intended such a result.

(1) The cross-bill contains no allegation that the landlord is without adequate remedy at law. It alleges repeated violations of the Prohibition Act, and the threat of their continuance; but these allegations are manifestly immaterial, since the action is not injunctive. The statute makes one past violation sufficient ground for forfeiture, and the threat of continued violations is no part of the cause of action. The cross-bill contains no allegation of fraud or other circumstance which inherently gives a court of equity power to forfeit, cancel or modify the leases in suit. The cross-bill is on its face a mere complaint in ejectment, or for dispossession of a tenant. It

contains allegations which are apt and necessary for these remedies, and no allegations whatever upon which a court of equity could inherently take or exert jurisdiction.

Admittedly, the States may by statute enlarge the equity powers of their courts, so as to create new remedies enforceable in equity. But it is settled that the Federal courts cannot even apply such statutes, and cannot proceed under them, if the enlargement is one which contravenes the distinction between law and equity as established in the Federal courts by reason of the Seventh Amendment, and deprives litigants of their constitutional right to trial by jury.

Scott v. Neely, 140 U. S., 106, 109;

Cates v. Allen, 149 U. S., 451;

Pusey & Jones v. Hanssen, 261 U. S., 491.

In the first of these cases, this Court said:

“The general proposition, as to the enforcement in the Federal courts of new equitable rights created by the States, is undoubtedly correct, subject, however, to this qualification, that such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States. Neither such right nor such inhibition can be in any way impaired, however fully the new equitable right may be enjoyed or enforced in the States by whose legislation it is created. The Constitution, in its Seventh Amendment, declares that ‘in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.’ In the Federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any

blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact."

In *Whitehead v. Shattuck*, 138 U. S., 146, the general principle of the Scott case was again affirmed, and a rule laid down which is squarely applicable to our case (p. 151):

"It would be difficult, and perhaps impossible, to state any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; *but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class.* The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

(2) If Federal courts are inhibited by the Seventh Amendment from *merely applying* an enlargement of equitable jurisdiction created by competent State legislation, *a fortiori* are they inhibited from proceeding in violation of this Amendment in cases of claimed *original* Federal jurisdiction. It has been precisely so held in *Black v. Jackson*, 177 U. S., 349. The action in this case was for

a mandatory injunction for the recovery of real property, and the Supreme Court of Oklahoma Territory had held that the defendant was not entitled to trial by jury. This Court reversed the decree *upon the precise ground that the Seventh Amendment applies to and is binding upon judicial proceedings in the Territories of the United States.*

Commenting upon the suggestion that equity might properly take jurisdiction because an action of forcible entry and detainer was not sufficiently speedy, this Court said (p. 363):

"But the same reason could be urged to justify the extraordinary remedy of a mandatory injunction in order to put a defendant out of possession, even where the plaintiff was entitled to maintain ejectment or an action in the nature of ejectment. The suggestion referred to leaves out of view the distinction made by the Constitution of the United States between cases in law and cases in equity. And it also fails to recognize the provisions of the Seventh Amendment securing the right of trial by jury in 'suits at common law' where the value in controversy exceeds twenty dollars. That Amendment, so far as it secures the right of trial by jury, applies to judicial proceedings in the Territories of the United States."

Squarely in point, again, is *Killian v. Ebbinghause*, 110 U. S., 568, 572.

The present case, it is respectfully submitted, is squarely controlled by the foregoing decisions.

(3) As between this petitioner and his landlord, the only issue in this case was whether the landlord was entitled to repossess himself of the premises occupied by the petitioner. Under the Iowa statute, as has been pointed out,

the landlord would have been required to proceed by action of forcible entry and detainer, and the petitioner would have had an absolute right to jury trial. Under the New York statutes, the landlord's remedy would have been in ejectment, or its statutory equivalent, summary dispossession proceedings. In either case the action would have been at law, and the parties would have been entitled as a matter of right to trial by jury. Bringing the action in the Federal court did not destroy that right; on the contrary, it could but strengthen it beyond all attack, by reason of the Seventh Amendment. As said in the leading case of *Lewis v. Cocks*, 23 Wallace, 466, 470:

"It is the universal practice of courts of equity to dismiss the bill, if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury."

And this is so, even if the point is not raised by demurrer, plea or answer, and is not suggested by counsel, and "notwithstanding the defendant has answered the bill, and insisted on matter of title."

Hipp v. Babin, 19 Howard, 271, 278;
Lewis v. Cocks, 23 Wallace, 466, 470.

SEVENTH POINT.

Whether the forfeiture provision of Section 23 of Title II be considered an action of ejectment, or of forcible entry and detainer, or of forfeiture of an estate in lands, or as a penalty for violation of the law—and it can be but one or the other of these—a construction of that provision which abolishes the established jurisdiction of the law courts in respect thereof, and seeks to transfer such jurisdiction to the equity side is violative of Article III, Section 2 of the Federal Constitution, which requires Congress to recognize and maintain the distinction between cases in law and cases in equity.

(1) If the action by a landlord to expel his tenant under the forfeiture provision of Section 23 be considered an action of ejectment,—and this is perhaps its closest equivalent in the books,—it carried with it right of trial by jury. (Section 425 of the New York Civil Practice Act).

Such an action is triable only at law and before a jury in the Federal Courts as well.

Lewis v. Cocks, 23 Wall., 466, 470;

Hipp v. Babin, 19 How., 271, 276.

(2) If the action be considered one of forcible entry and detainer (as expressly provided in the parent statute in Iowa), the right to trial by jury is equally clear, both in New York and in the Federal Courts. (*People v. Reed*, 11 Wend. 157, 159; N. Y. Civil Practice Act, Sections 1421 to 1428; N. Y. Real Property Law, Section 535).

(3) The absolute right to a jury trial under the New York Constitution is equally clear if the action be considered one of forfeiture. *Colon v. Lisk*, 153 N. Y., 188, 194.

Of the rights of a defendant in such a case in a Federal Court, Mr. Chief Justice MARSHALL said, in *The Sarah*, 8 Wheat., 391, 394:

"In the trial of all cases of seizure, on land, the Court sits as a Court of common law. * * * In all cases at common law, the trial must be by jury."

(4) So, also, if the action is to impose a penalty for violation of the law,—though it is difficult in the utmost to see how the action can possibly be so construed, since it is not an action of debt to mulct the defendant pecuniarily in an ascertained or ascertainable sum provided by the statute. If the action is for the recovery of a money penalty only, Section 425 of the Civil Practice Act, quoted above, governs; and as to penalties and forfeitures generally, see *Colon v. Lisk*, *supra*, 153 N. Y., 188.

The same thing is necessarily true in the Federal Courts, since the action is either in debt or quasi-criminal.

Boyd v. United States, 116 U. S., 616, 634;

United States v. Chouteau, 102 U. S., 603, 611;

Lipke v. Lederer, 259 U. S., 557, 561.

(5) We have limited our consideration to these four possible interpretations of the statute, because it is inconceivable to us what other known or definable legal character the action can be given. Clearly the forfeiture provision of Section 23 and the action thereunder have nothing to do with the abatement of nuisances,—in the

first place, because the section deals with the abatement of *public* nuisances by *public officials* only, and gives no right of abatement to private individuals; and in the second place, because the landlord is not required to prove the continuance of the alleged nuisance at the time of hearing, or any threat or probability or even any possibility of its continuance, and even the voluntary prior abatement of the nuisance is no defense. Equally clear is it that the action is not for the cancellation of the lease, for none of the usual elements of such an action, such as fraud, mistake or accident need be established, but the mere fact of one past violation ("*any* violation") of the statute is sufficient. Furthermore, neither the prayer for relief nor the decree in this case is limited to mere cancellation. The relief asked and given was, on the contrary, typical of actions for the recovery of possession of real property, namely, *ousier* and *repossession*.

EIGHTH POINT.

In view of the established principle that equity will relieve from forfeitures but will not enforce them, it cannot be supposed that Congress intended to vest courts of equity with jurisdiction to enforce forfeitures under Section 23 of Title II, particularly if the section is to be construed—as, apparently, it was construed by the Trial Court—as depriving the Court of discretion and as being mandatory.

The Realty Corporation was emphatically not in court with clean hands or seeking or offering to do equity. The lease provided that the premises should be used "for a Men's Cafe and Hotel for Men" (fol. 646). The Realty

Corporation put the unwarranted interpretation upon this (fol. 97) that it "prohibits the use of the leased premises for any purpose other than a hotel and saloon."

Apparently relying upon this misinterpretation of the lease, the Realty Corporation (fol. 469) had refused the petitioner permission even to take out the saloon fixtures and to change the premises into a cafeteria, as he was clearly entitled to do. The Realty Corporation had persistently refused to permit sub-letting of the premises. The uncontradicted evidence established a situation of such a character that even the Trial Court felt (fol. 603) that "it is somewhat harsh perhaps to cancel (the lease) absolutely, running, as it does, for a great many years." But it seemed to the Court (fol. 426) that "this provision of the statute is *mandatory*"; and the Court did not think (fol. 603) that it had any discretion in the matter.

The extraordinary situation is thus presented that this statute is being interpreted so as not only to vest a court of equity with jurisdiction to declare a forfeiture, but, in addition, to deprive the Court of that element of discretion without which it is a sheer misnomer to call the proceeding one in equity.

The earlier rule was absolute and inflexible (*Marshall v. Vicksburg*, 15 Wall., 146, 149), that

"Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either."

This rule has been somewhat relaxed; but it is still true that forfeitures are never favored. *Henderson v. Carbondale Coal & Coke Company*, 140 U. S., 25, 33:

"Equity always leans against them, and only decrees in their favor when there is a full, clear and strict proof of a legal right thereto."

The reasons why equity always leans against forfeitures are peculiarly applicable to our case,—

“because forfeitures are usually harsh and oppressive and because they can ordinarily be enforced at law.” (Mr. Justice VAN DEVANTER in *Brewster v. Lanyon Zinc Co.*, 140 Fed., 801, 818 [8th, C. C. A.])

Congress must be presumed to have had this classic antagonism against forfeiture in mind when, in enacting this provision of Section 23, it *expressly refrained from vesting jurisdiction of actions thereunder in equity*. On the other hand, if it be contended, nevertheless, that Congress meant to vest equity with this jurisdiction, it cannot be supposed for a moment that it also intended to deprive the Court of that flexibility and discretion which has been called “the beautiful character or pervading excellence, if one may say so, of equity jurisprudence.” *Story Eq. Jur.*, Section 439, quoted with approval by Mr. Justice VAN DEVANTER, in *Brewster v. Lanyon Zinc Company*, *supra*, 140 Fed., 801, 819.

In either event, the construction put upon the statute by the courts below was serious error. The question is one of frequent recurrence and grave importance. It merits the first consideration of this Court.

NINTH POINT.

Section 23 of Title II does not operate retroactively. It does not affect leases made prior to its adoption, and under the Constitution could not affect them.

(1) The petitioner's first lease for the premises was made April 20, 1916. A supplemental lease was entered into July 27, 1916. Both leases were in existence and

effect prior to the adoption of the Eighteenth Amendment and before the enactment of the National Prohibition Act.

There is nothing in the forfeiture provision of Section 23 to indicate that Congress intended it to apply to existing leases. This, of itself, is sufficient to take such leases out of the statute.

In *Shreveport v. Cole*, 129 U. S., 36, 43, this Court said, by Mr. Chief Justice Fuller:

"Constitutions as well as statutes are construed to operate prospectively only, *unless, on the face of the instrument or enactment, the contrary intention is manifest beyond reasonable doubt.*"

In *City Railway Co. v. Citizens Railroad Co.*, 166 U. S., 557, 565, this Court said of the statute there under consideration that

"it certainly should not be construed to act retrospectively or to affect contracts entered into prior to its passage, unless its language be so clear *as to admit of no other construction* * * *. There is always a presumption that statutes are intended to operate prospectively only * * *."

(2) Moreover, a construction of the statute, which makes it applicable to existing contracts, would condemn it as unconstitutional.

If the State of New York had enacted the legislation we are considering, it is not seriously open to dispute that as to existing contracts it would have been held unconstitutional, under the provision of Section 10, Article I, that "No state shall * * * pass any * * * law impairing the obligation of contracts."

Brine v. Insurance Company, 96 U. S., 627;
Barnitz v. Beverly, 163 U. S., 118, 122;
In re Ayers, 123 U. S., 443, 504;
State Tax on Foreign Held Bonds, 15 Wallace,
 300, 320.

In the last cited case, this Court said, Mr. Justice Field writing:

"A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligations, * * *."

In *In re Ayers*, 123 U. S., 443, 505, this Court said:

"In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. *Louisiana v. New Orleans*, 102 U. S., 203. That obligation, by virtue of the provision of Article I, Section 10, of the Constitution of the United States, cannot be impaired by any subsequent state legislation. *Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement.*"

(3) It is no answer to this difficulty to say that the act we are considering is an Act of Congress, and that Article I, Section 10 applies only to the States. In enacting this statute, Congress purported to exercise its concurrent power to enforce the Eighteenth Amendment. Otherwise Congress could no more have legislated with respect to the terms of leases and the conditions of their forfeiture than, under its power to regulate interstate commerce, it was able to regulate child labor within the several states.

Hammer v. Dagenhart, 217 U. S., 251. On the other hand, in exercising its power to act within the State, Congress must necessarily proceed within the same limitations which would have governed any State which had itself undertaken such legislation.

It would be monstrous to suppose that Congress has been vested with the powers of the States, without the fundamental restraints which have always accompanied them. And yet this is precisely what must be contended if the forfeiture provision of Section 23 is not only to be sustained as valid legislation, but, in addition, is made to apply to leases executed and in force before the Eighteenth Amendment and before the National Prohibition Act. As said by this Court in *Keller v. United States*, 213 U. S., 138, 149:

"While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced."

TENTH POINT.

The leases in suit were executed April 20, 1916, and July 27, 1916, respectively. The Prohibition Act did not become a law until October 28, 1919.

The Act of Congress limits itself to legislating a new substantive covenant, by way of new ground for forfeiture, into these leases. It says nothing about remedies for breach; and it was not intended to, and it does not, disturb the limitations contemplated by the parties when they executed these leases.

Parties to a contract procure rights thereunder, of co-ordinate importance, to both the affirmative obligations of the contract and to the mode of enforcement in existence when the contract is made.

Brine v. Insurance Company, 96 U. S., 627, 637;
Barnitz v. Beverly, 163 U. S., 118, 122.

Manifestly Congress was legislating only with respect to the affirmative obligations imposed by leases, and not at all with respect to the mode or procedure for their enforcement. The forfeiture provision of Section 23 is silent as to remedies for its breach. There is nothing to indicate that Congress intended to affect the mode of enforcement in any manner whatever.

ELEVENTH POINT.

If the forfeiture provision of Section 23 of Title II can be construed as a criminal penalty for violation of the law, it is unconstitutional under the prohibition against excessive fines and cruel or unusual punishment. At least its application to the present case is unconstitutional for this reason, for it imposes a penalty of \$250,000.

An officer of the United States Government who uses his position for the purpose of extortion, is subject to a maximum fine of \$500.

A member of Congress who takes a bribe for procuring a contract, etc. is liable to a fine of not more than \$10,000. An officer who knowingly makes a false acknowledgment may be fined not more than \$2,000.

A fine of \$5,000 is imposed for falsely making, forging, counterfeiting, or altering letters patent granted or purporting to be granted by the President of the United States.

Conspiracy to commit an offense against the United States is punishable by fine of not more than \$10,000.

If the forfeiture provision of Section 23 can be considered a fine for violation of the National Prohibition Act, this petitioner has been fined \$250,000. There is no reason under the forfeiture provision why the fine may not be several times that amount, for only the accident of the value of this lease limited the mulct to \$250,000. "It is to be remembered that the question (of constitutionality) is to be determined not by what has been done under (the Act) in any particular instance, but by what may be done under and by virtue of its authority." (*Colon v. Lisk*, 153 N. Y., at p. 191.)

Of such a statute the aptest possible comment is the language of this Court in *Weems v. United States*, 217 U. S., 349, 366, *et seq.*:

"Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."

In that case a comparison was made by this Court between the penalty before the Court and penalties for other offenses; and it was said (p. 381):

"And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."

TWELFTH POINT.

The lack of jurisdiction of the Trial Court to try an action under the forfeiture provision of Section 23 of Title II was clearly raised and incorrectly decided. Even, however, if the point had not been suggested in any manner, it was the duty of the Court sua sponte to recognize it and give it effect, and to dismiss the Realty Corporation's cross-bill for lack of jurisdiction.

While this action was still pending on the calendar and before trial, petitioner moved for trial by jury (fol. 70); but his motion was denied by the Court (fol. 123). At

the trial, petitioner objected to the admission of any evidence in support of the Realty Corporation's cross-bill (fol. 378), but was overruled and duly excepted. The petitioner raised the point again at the end of the entire case, but was again overruled by the Court (fol. 600, *et seq.*).

Moreover, it was apparent on the face of the bill that the action was not properly triable in equity. Hence, the Court should, of its own motion, have sent the action to the law side for trial before a jury, or dismissed the bill without prejudice.

In *Lewis v. Cocks*, 23 Wall., 466, 470, this Court held that an action of ejectment would have been an adequate remedy for the complainant, and directed dismissal of the bill for that reason. Mr. Justice SWAYNE said:

"In the present case the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel, nevertheless if it clearly exists it is the duty of the court *sua sponte* to recognize it and give it effect."

In *Hipp v. Babin*, referred to by Mr. Justice SWAYNE (19 How., 271, 276), it appeared that the jurisdiction of the court had been admitted during a litigation of more than ten years, and that no objection to the jurisdiction was raised by the pleadings or on the argument of the case in any court. Nevertheless, this Court affirmed a decree dismissing the bill, because the action was (p. 277) "in substance and legal effect, an ejectment bill." The Court quoted as applicable authority Section 16 of the Judiciary Act of 1789, now Section 267 of the Judicial Code, with only an immaterial change of a few words:

"Suits in equity shall not be sustained in any

court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

And the obligation upon the Federal Courts to take cognizance, of their own motion, of the fact that the action is not properly in equity, is now embodied in Rule 22 of the New Federal Equity Rules, as follows:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

CONCLUSION.

The petition for writ of certiorari should be granted.

The forfeiture provision of Section 23 of Title II of the National Prohibition Act has never been construed and its validity has never been passed upon by this Court. The questions raised by the statute are highly unusual and of grave, as well as general importance. Many of them have never been before this Court for adjudication. Upon well-settled principles, therefore, the writ of certiorari should be granted.

Dated, New York, May 7th, 1925.

Respectfully submitted,

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No. 101.

FILED

DEC 6 1926

WM. R. STANSBURY
CLERK

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1926.

JAMES DUIGNAN,

Petitioner,

against

UNITED STATES OF AMERICA,
PALL MALL REALTY CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR JAMES DUIGNAN.

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Any interpretation of the forfeiture provision of Section 23, which undertakes to deprive a citizen of the State of New York of his right to a jury trial under the Constitution and statutes of that State in respect to his relation to his property, as regards another individual, condemns the provision as unconstitutional under the Tenth Amendment to the Federal Constitution.....

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IN THE
Supreme Court of the United States,

OCTOBER TERM 1926.

JAMES DUIGNAN, Petitioner, AGAINST UNITED STATES OF AMERICA, and PALL MALL REALTY CORPORATION, Respondents.	}
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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

**BRIEF FOR JAMES DUIGNAN,
PETITIONER.**

Opinion of the Courts Below.

This was an action brought by the respondent, United States of America, to abate an alleged nuisance on premises leased by the petitioner in the Borough of Manhattan, New York City. A cross bill was filed by the respondent, Pall Mall Realty Corporation, praying for forfeiture and cancellation of the petitioner's lease of the premises in question under Section 23, Title II of the National Prohibition Act.

Judgment was rendered adjudging petitioner's premises a common nuisance and declaring forfeited and cancelling petitioner's lease (R. 2).

United States v. Duignan, Decree (R. 2). Opinion (R. 137).

The Circuit Court of Appeals for the Second Circuit affirmed the judgment of the District Court (R. 152) writing an opinion (R. 150). Judgment filed February 9th, 1925 (R. 152).

United States v. Duignan, 4 Fed. (2nd Series) 983 (S. D. N. Y.).

Grounds of Jurisdiction.

The judgment to be reviewed herein is dated March 28th, 1924 (R. 2).

The complaint of the United States alleged the maintenance of a common nuisance on the premises occupied by the petitioner. The original complaint did not make the respondent Pall Mall Realty Corporation a defendant, but it was amended by adding the realty corporation. The corporation answered admitting the allegations of the complaint and, by way of cross-bill against the petitioner, alleged that the premises were a common nuisance and asked judgment under Section 23, Title II of the National Prohibition Act declaring forfeited and cancelling the petitioner's lease of the premises in question. The petitioner answered denying the allegations of the complaint and duly moved for a jury trial (R. 12). The Court denied this motion (R. 21). At the very outset of the realty corporation's case the petitioner objected to the admission of any evidence in support of its demand for forfeiture and cancellation of petitioner's lease (R. 81), on the ground that the statute involved, Section 23, Title II, deprived petitioner of his property without due process of law (R. 92).

Briefly stated, the ultimate questions are these:

1. Under Section 23 of Title II of the National Prohibition Act has a Federal court of equity power and jurisdiction to declare a forfeiture of an existing lease at the suit of the landlord?

2. Since, under the constitution and laws of the State of New York, a forfeiture of an existing lease can be adjudicated only after trial by jury, could Congress constitutionally deprive the citizens of that State of that right?

3. Did the Eighteenth Amendment delegate to Congress the power to confer upon a landlord the right to cancel a lease because of the commission on the premises of an offense against the Prohibition Act?

4. Has a Federal Court (in the absence of a diversity of citizenship) any jurisdiction to enforce a forfeiture under Section 23 of Title II of the National Prohibition Act?

5. If so, is the Federal Court bound to recognize the right of jury trial applicable to such actions in the state courts?

6. Can Section 23 of Title II have any application to leases made *prior* to the enactment of the section?

7. Was the Trial Court right in interpreting Section 23 of Title II as mandatory and as depriving it of discretion?

The far-reaching importance of these questions is obvious. As far as we can ascertain none of them has as yet been determined by this Court. They necessarily involve constitutional considerations of the utmost gravity. Proceedings by the Government to "padlock" premises where offenses against the Prohibition Act are charged to have been committed, are on the increase. The use of such proceedings by landlords to secure, by way of a cross-bill, a forfeiture of the lease itself is novel; and the decisions below sustaining this device have far-reaching consequences and involve important principles of constitutional law, particularly where (as here) the lease antedates the Prohibition Act.

Statement.

The complaint of the United States alleged the maintenance of a common nuisance on the premises occupied by the petitioner. These premises consist of basement, ground floor and upper stories of building Nos. 655-657 Eighth Avenue, Manhattan, New York City, in that intoxicating liquors were sold on said premises in alleged violations of Title I and II of the National Prohibition Act (R. 5). Complaint alleged only that the saloon portion of the premises "located on the ground floor and in the basement of the building" was a nuisance (R. 5), and confined its prayer for abatement to that portion of the premises (R. 6). The realty corporation in its answer admitted the allegations of the complaint and, by way of cross-bill against the petitioner, alleged that the *entire* premises, both saloon and hotel, were a common nuisance, and asked judgment declaring forfeited and cancelling the petitioner's lease, and asking that the petitioner be ousted from the premises and that the Pall Mall Realty Corporation be repossessed of the same (R. 9). The Government's allegations of nuisance and prayer for relief were never amended. In spite of this fact the District Court made its padlock decree apply to both saloon and hotel.

The trial, both of the Government's complaint and of the Realty Corporation's cross-bill, was had on the Equity side of the Court. The petitioner objected at the very outset of the Realty Corporation's case to the admission of any evidence in support of the Realty Corporation's cross-bill (R. 81), but was overruled, and duly excepted.

The petitioner also moved for a jury trial (R. 12), but his motion was denied by the Court (R. 21). This was duly assigned as error (R. 3).

At the end of the entire case, the petitioner again attacked the constitutionality of an interpretation of the forfeiture provision of Section 23 which would permit the landlord to procure forfeiture of the lease and ouster of the tenant by cross-bill in an equity action and without jury trial, and

moved anew to dismiss the landlord's cross-bill,—upon all of which points, however, he was overruled by the Court (R. 133, *et seq.*).

The premises in question are the Southwest corner of 42nd Street and Eighth Avenue in New York City (R. 85). The petitioner's lease was for a term of 19 years and 11 months from June 1, 1916 to April 30, 1936, at a rent of \$12,500 per year for the first two years, and of \$14,000 per year for the balance of the term (R. 93, *et seq.*). *Thus the lease was made before the adoption of the Eighteenth Amendment.*

It was testified on the trial, without contradiction, that at the time of the trial the annual rental value of the premises was \$39,000 a year,—thus exceeding the rental stipulated in the lease by \$24,400 per year (R. 94).

The petitioner's testimony showed, without contradiction, that before going into possession, he had expended \$62,500 in fitting the premises for use (R. 99).

The lease provided that the premises should be used by the petitioner "as and for a Men's Cafe and Hotel for Men," and that the premises should "not be used for any other purpose, unless consented to in writing by the landlord" (R. 96).

The interpretation placed upon this provision by the landlord itself was that it "prohibits the use of the leased premises for any purpose other than a hotel *and saloon*" (R. 94).

The uncontradicted evidence was that in 1919, and long before any alleged violation of the Prohibition Act, the petitioner procured a sub-lessee for the entire premises, National Drug Store Company, and entered into a lease with that Company, subject to the landlord's approval. The landlord, however, unconditionally refused to give such approval. The petitioner had the following conversation—not denied or contradicted—with the vice-president of the landlord (R. 100, *et seq.*):

"I asked him to let me put in some other business in the place. He said, 'No, we will get much more money for the corner.' I says, 'Well, I got the lease,' and he

says, 'Yes, you got the lease, but you got a cheap lease,' and I says, 'But I spent a lot of money on this place and you are depriving me from renting this place to the National Drug Stores Company,' and he says, 'We won't let you sublet it.' Then I made an appointment to go down to the Pall Mall Realty Company, and asked them to let me put some other business in, and they refused unless I paid an exorbitant rent."

Thereupon the petitioner sought the landlord's permission to remove the saloon fixtures and to fit the premises up as a cafeteria. This, again, was unconditionally refused. The petitioner had a conversation,—which was again not denied or contradicted,—with the same officer of the landlord, on this point (R. 101, *et seq.*) :

"Q. 39. You then had a conversation with Mr. Polog now in regard to altering the fixtures so as to make a cafeteria in the premises? A. Yes, sir.

"Q. 40. When did you have that conversation? A. Shortly after that I said, 'I want to put a cafeteria in here.'

"Q. 41. Did you tell him you wanted to rip out the old bar fixtures? A. Yes, sir, I told him I wanted to rip out the old bar fixtures and change it into a cafeteria, and he said, 'We won't let you do anything with it.'

"Q. 42. What did he tell you your clause in the lease was? A. That it was for a hotel and restaurant and I can't make any alterations without the written consent which is called for in the lease.

"Q. 43. Not without the written consent called for in the lease? A. No.

"Q. 44. Did you ask him to give a written consent of the Realty Company for the alterations? A. Yes, sir.

"Q. 45. What did he say? A. He wouldn't do it.

On the trial, the petitioner offered, in open court, to remodel the premises into a cafeteria and to remove all fittings having to do with the sale of liquor, if the landlord would give its consent (R. 135). This the landlord refused, in open court.

Thereupon the petitioner offered, in open court, to stipu-

late that the petitioner would go out of the premises and would relet them "to a clothing store or drug store or any other line of business" having nothing to do with possible violations of the Prohibition Act, and asked the consent of the landlord, in open court, to this arrangement "as a matter of equity" (R. 135, *et seq.*). This the landlord again refused to do.

The Government's affirmative case showed that at the very time the landlord was refusing to permit the petitioner to sublet the premises or to refit them for other than saloon purposes, the landlord was employing detectives to obtain evidence of violations of the Prohibition Act, and was going so far as to maintain private detectives, in the guise of guests, at the petitioner's hotel for that purpose (R. 99, *et seq.*) Indeed, the case against the petitioner rests preponderantly upon the testimony of these private detectives, "planted" by the landlord for the express purpose of obtaining such evidence.

The petitioner made the point on the trial that even if the matter were one properly cognizable in a court of equity, the landlord was not entitled to relief because it was itself persistently refusing to do equity; and the petitioner offered evidence in support of this defense. Of this offer the Court said (fol. 426) :

"I would like to take it, as far as that is concerned, but it seems this provision of the statute is mandatory."

At a later point in the trial the Court said further concerning this aspect of the case (fol. 603) :

"It does seem, I am quite free to admit, that this lease is of such character that it is somewhat harsh perhaps to cancel it absolutely, running, as it does, for a great many years."

Section 22 of Title II of the Prohibition Act, under which the Government was proceeding, provides :

"Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases."

Section 23 of the same title, under which the landlord was proceeding, provides:

"Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease."

There is nothing in Section 23 or anywhere else in the Act indicating in what courts or by what proceedings such a forfeiture shall be adjudged, or that such section is intended to operate upon prior leases.

In only three reported cases, so far as this petitioner is apprised, has the question of procedure under this section been passed upon by the courts. The result has been a conflict.

In *Grossman v. United States*, 280 Fed. (C. C. A., 7th Circuit), 683, the Court did not discuss the constitutionality or correctness of an interpretation of Section 23 of Title II which would invest a court of equity with the power to adjudge a forfeiture, but, apparently assuming that a Federal equity court had such power, held that a cross-bill for such relief could be properly entertained, because the subject-matter is germane to that of the original bill.

The Grossman case is, so far as this petitioner is apprised, the only decision by a Circuit Court of Appeals upon this point. The other two decisions are in the District Courts, and are clearly in conflict with each other.

United States v. Lot 29, etc., City of Omaha, 296 Fed. 729, is a decision by Judge WOODBROUGH of the District Court of Nebraska. There was no question before the Court in this case between landlord and tenant under Section 23, Title II; but upon the facts of the case the Court considered the constitutionality of both Sections 22 and 23 of Title II, and reached the conclusion that, whatever might be held in respect of such legislation when enacted by the States, it could not be sustained when enacted by the Federal Government. The Court said (p. 737):

"It seems to me of great importance that the constitutional question which is directly involved in this case should be presented promptly to the Supreme Court of the United States."

United States v. Boynton, et al., 297 Fed. 261, is a decision by the District Court in the Eastern District of Michigan. The Court relied solely upon the authority of the *Grossman case*; and, upon the same assumption which was made in the *Grossman case*, that the action of forfeiture could be entertained by a court of equity, the Court decided that the filing of a cross-bill was a proper practice, because germane to the main issue.

Specification of Assigned Errors.

1. The Court erred in denying this defendant's motion for a jury trial of this action.
2. The Court erred in denying the motion of this defendant at the close of the complainant's case to dismiss the complaint on the ground that the testimony failed to show this defendant maintained a nuisance within the meaning of the statute.
3. The Court erred in permitting the defendant landlord to submit evidence in this action to sustain its cross-bill set up in its answer.
4. The Court erred in sustaining the case of action set up in the landlord-defendant's answer because the National Prohibition Act does not provide much action by way of cross action in an equity action brought under Section 22 of that Act.
5. The Court erred in granting judgment in favor of the defendant landlord cancelling this defendant-appellant's lease.

6. The Court erred in denying the motions made at the close of the whole case on behalf of this defendant, to dismiss both defendant's cross bill and the bill of complaint.

7. The Court erred in granting judgment in favor of the defendant landlord cancelling lease of the defendant Duignan.

8. The Court erred in entering the decree against this defendant-appellant and the premises, in that the evidence clearly indicated that any nuisance that might have been found to have existed on the testimony of the complainant, was terminated before the institution of the action.

SUMMARY OF ARGUMENT.

- I. The origin and history of the forfeiture provision of Section 23 of Title II show unmistakably that Congress had in mind at the time of its enactment the constitutional distinction in respect of jurisdiction between courts of law and courts of equity and the constitutional guarantee of the right to trial by jury in actions at law.
- II. It is settled beyond dispute that under the Constitution and laws of New York the defendant in an action or counterclaim for the recovery of real property is entitled to trial by jury unless he has waived his right thereto in the manner prescribed by the New York Statutes.
- III. The forfeiture provision of Section 23 of Title II concerns only the rights of individuals in real estate. The procedure established by the several States in respect of such rights, governing their creation, tenure and transfer, is binding upon the Federal Courts.
- IV. There is nothing in the Eighteenth Amendment diminishing the reserved and exclusive right of the several States to govern by local legislation the creation, tenure and termination of interests or estates in real property situated within their respective borders.
Nor is there any provision in the forfeiture clause of Section 23, Title II, which abrogates, or purports to abrogate, the statutes of the several States for the creation, tenure or termination of such rights.
Any interpretation of the forfeiture provision of Section 23, which undertakes to deprive a citizen of the State of New York of his rights to a jury trial under the Constitution and statutes of that State in respect to his relation to his property, as regards another individual, condemns the provision as unconstitutional under the Tenth Amendment to the Federal Constitution.

- V. Moreover, in the absence of any showing of diversity of citizenship, the District Court had no jurisdiction to try this action between landlord and tenant.
- VI. A construction of the forfeiture provision of Section 23 of Title II which deprives the defendant therein of the right to trial by jury, condemns the provision as violative of the Seventh Amendment to the Federal Constitution guaranteeing trial by jury. Congress can not be presumed to have intended such a result.
- VII. Whether the forfeiture provision of Section 23 of Title II be considered an action of ejectment, or of forcible entry and detainer, or of forfeiture of an estate in lands, or as a penalty for violation of the law—and it can be but one or the other of these—a construction of that provision which abolishes the established jurisdiction of the law courts in respect thereof, and seeks to transfer such jurisdiction to the equity side is violative of Article III, Section 2 of the Federal Constitution, which requires Congress to recognize and maintain the distinction between cases in law and cases in equity.
- VIII. In view of the established principle that equity will relieve from forfeitures but will not enforce them, it cannot be supposed that Congress intended to vest courts of equity with jurisdiction to enforce forfeitures under Section 23 of Title II, particularly if the action is to be construed—as, apparently, it was construed by the trial Court—as depriving the Court of discretion and as being mandatory.
- IX. Section 23 of Title II does not operate retroactively. It does not affect leases made prior to its adoption, and under the Constitution could not affect them.
- X. The leases in suit were executed April 20, 1916, and July 27, 1916, respectively. The Prohibition Act did not become a law until October 28, 1919. The Act of Congress limits itself to legislating a new substantive covenant, by way of new ground for for-

feiture, into these leases. It says nothing about remedies for breach; and it was not intended to, and it does not, disturb the limitations contemplated by the parties when they executed these leases.

XI. If the forfeiture provisions of Section 23 of Title II can be construed as a criminal penalty for violation of the law, it is unconstitutional under the prohibition against excessive fines and cruel or unusual punishment. At least its application to the present case is unconstitutional for this reason, for it imposes a penalty of \$250,000.

XII. The lack of jurisdiction of the Trial Court to try an action under the forfeiture provision of Section 23 of Title II was clearly raised and incorrectly decided. Even, however, if the point had not been suggested in any manner, it was the duty of the Court *sua sponte* to recognize it and give it effect, and to dismiss the Realty Corporation's cross-bill for lack of jurisdiction.

ARGUMENT.

I.

The origin and history of the forfeiture provision of Section 23 of Title II show unmistakably that Congress had in mind at the time of its enactment the constitutional distinction in respect of jurisdiction between courts of law and courts of equity and the constitutional guarantee of the right to trial by jury in actions at law.

(1) Two classic differences of power between the several States and the United States are of controlling significance in this case:

In the first place, the States may, and generally do, dispense with trial by jury in cases of petty criminal offenses, but the Government of the United States is bound absolutely by the provisions of the Sixth Amendment that in *all* criminal prosecutions or proceedings in the nature of criminal prosecutions, without regard to the degree of the offense, the accused shall enjoy the right to trial by jury.

In the second place, the States may create new equitable rights in civil actions and provide remedies for their enforcement, thereby depriving the parties of their day before a jury; but the United States is bound absolutely by the provisions of the Seventh Amendment that in any suit at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, and by the provisions of Article III, Section 2 of the Federal Constitution, that the distinction between law and equity shall be maintained inviolate (see Sixth Point, p. 25, *et seq.* of this brief).

If the forfeiture provision is criminal, quasi-criminal or penal in character, the United States is thus without power to abrogate the right of jury trial thereunder, unless the

Eighteenth Amendment is to be construed as, *pro tanto*, overriding the provisions of the Sixth Amendment. (See Seventh Point, p. 29 of this brief.)

Whether the forfeiture provision of Section 23 of Title II is to be construed, therefore, as criminal or civil, the result must be the same, since in either event, Congress must be presumed to have enacted it with these limitations upon the power of the Federal Government in mind, and must be presumed to have intended that the right of defendants thereunder to trial by jury should be preserved.

(2) It thus becomes significant in the highest degree, that Section 23 seems clearly to have been taken from the Iowa statute, which preserves the right of jury trial, rather than from the statute books of one of the other States, following the contrary policy of abrogating that right. The only explanation can be that Congress had in mind its peculiar limitations of power in enacting this statute. See 58 Congressional Record, p. 2891, particularly the statement of Mr. Boies, of Iowa, a member of the Judiciary Committee of the 66th Congress, who defended this statute in the discussion in Congress upon the express precedent of the parent statute in his own State, Iowa.

The parent provision in the Iowa statute (Code of Iowa, 1924, Ch. 99, § 2071) is as follows:

"Termination of Lease. Upon a violation of any provision of this title committed upon real estate occupied by a tenant, his agent, servant, clerk, employee, or anyone claiming under him, the landlord of such premises, by himself or agent, may, in writing, notify such agent, tenant, or the person in possession of said leased premises, to the effect that he has terminated such lease and demands possession thereof within three days after the giving of such notice, and, after expiration of said three days, may recover possession thereof *in an action of forcible entry and detainer*, without further notice to quit, upon proof of the violation of any provision of this title committed upon such real estate and of the giving of such notice." (Italics ours.)

It will be observed that the foregoing provision in the Iowa law gives precise definition to the action of the landlord as "an action of forcible entry and detainer". Such an action, without more, would be triable at law before a jury. (Section 8, Article I, Iowa Constitution.)

The intent of Congress, therefore, in going back to the State of Iowa, rather than to any other State, for Section 23 of Title II, can only have been to recognize and abide by the absolute duty upon Congress to preserve the right to trial by jury in such cases.

(3) A comparison of Section 22 and the abatement provision of Section 23 of Title II, with the forfeiture provision of Section 23, makes this intent even clearer. Section 22, which deals with abatement of nuisances, a recognized field of equitable jurisdiction and injunctive relief, provides expressly that the action therein contemplated "shall be brought and tried as an action in equity". The first paragraph of Section 23, which deals again with nuisances, provides expressly that persons guilty of a nuisance "may be restrained by injunction, temporary or permanent, from doing or continuing to do any of said acts or things". *The last paragraph of Section 23, however, which is the forfeiture paragraph, does not by any remotest suggestion undertake to provide that the action therein provided shall be had in a court of equity or shall be maintainable by injunctive procedure.*

In an enactment so carefully drawn as the National Prohibition Act to avoid delays of criminal proceedings and of actions at law, by substituting wherever possible the summary proceedings of a court of equity, the mere fact that a particular provision does not, in terms, vest courts of equity with jurisdiction is almost sufficient of itself to lead to the conclusion that Congress did not intend that jurisdiction of such cases should be so vested.

II.

It is settled beyond dispute that under the Constitution and laws of New York the defendant in an action or counterclaim for the recovery of real property is entitled to trial by jury unless he has waived his right thereto in the manner prescribed by the New York statutes.

For many years the New York statute has continuously provided that issues of fact in an action of ejectment must be tried by a jury, unless a jury trial is waived (New York Civil Practice Act, Section 425); and even in the case of *summary proceedings* to recover possession of real property, the action is at law and the tenant is entitled absolutely to trial by jury. New York Civil Practice Act, Section 1428.

These statutes necessarily so provide, for the guaranty of trial by jury in the New York Constitution expressly preserves that right "in all cases in which it has been heretofore used".

The statutes of New York prescribe the manner in which trial by jury may be waived. Section 426 of the New York Civil Practice Act provides:

"A party may waive his right to the trial of the issue of fact by a jury, in any of the following modes:

"1. By failing to appear at the trial.

"2. By filing with the clerk a written waiver signed by an attorney for the party.

"3. By an oral consent in open court entered in the minutes.

"4. By moving the trial of the action without a jury, or, if the adverse party so moves it, by failing to claim a trial by a jury before the production of any evidence upon the trial."

The petitioner did not waive his right to a jury trial by any one of these four enumerated modes.

On the contrary, petitioner specifically demanded trial by jury (R. 12), and the refusal of the Court (R. 21) was duly assigned as error (R. 3). The motion for a jury trial, which was made by the petitioner (R. 12) was such a motion as would have been properly made in the state court under like circumstances. The procedure in the state courts permits joinder of actions at law and in equity (New York Civil Practice Act, Section 258); and provides for the treatment of a counterclaim as though it were a separate trial of the issues thereby presented (New York Civil Practice Act, Section 424). Where a cause of action in equity is joined with one at law, or a legal counterclaim is interposed in an action in equity, the parties may move for and procure as of right a separate jury trial of the legal issues. This was precisely what the petitioner demanded in the District Court, which was bound to govern itself by the State procedure. *Arndt v. Griggs*, 134 U. S. 316, 321.

III.

The forfeiture provision of Section 23 of Title II concerns only the rights of individuals in real estate. The procedure established by the several States in respect of such rights, governing their creation, tenure and transfer, is binding upon the Federal Courts.

The property affected by the decree in this case is situated in New York State. The petitioner's leasehold interest therein was an estate in real property under the Laws of New York. Section 240 (4) of the New York Real Property Law declares:

"The terms 'estate' and 'interest in real property' include every such estate and interest, freehold or chattel, legal or equitable, present or future, vested or contingent."

The creation, tenure and termination of such estates are subject exclusively to the laws of the State. The United States has no power or jurisdiction in respect of such interests, or of their tenure, or of the law or procedure for their transfer or disposition.

Arndt v. Griggs, 134 U. S. 316, 321;

U. S. v. Fox, 94 U. S. 315, 320;

King, et al. v. American Transportation Co., 14 Fed. Case, 511; Fed. Case No. 7,787;

McCormick v. Sullicant, 10 Wheaton, 192, 202;

Beauregard v. The City of New Orleans, et al., 18 How. 497;

Suydam v. Williamson, 24 How. 427;

Christian Union v. Yount, 101 U. S. 352;

Lathrop v. Bank, 8 Dana, 114.

The reservation of this jurisdiction to the several states *exclusively* has often been recognized by this Court.

In *Arndt v. Griggs*, 134 U. S. 316, 321, we read:

"The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. *The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the State, in this respect, is binding upon the federal courts.*"

IV.

There is nothing in the Eighteenth Amendment diminishing the reserved and exclusive right of the several States to govern by local legislation the creation, tenure and termination of interests or estates in real property situated within their respective borders.

Nor is there any provision in the forfeiture clause of Section 23, Title II, which abrogates, or purports to abrogate, the statutes of the several States for the creation, tenure or termination of such rights.

Any interpretation of the forfeiture provision of Section 23, which undertakes to deprive a citizen of the State of New York of his right to a jury trial under the Constitution and statutes of that State in respect to his relation to his property, as regards another individual, condemns the provision as unconstitutional under the Tenth Amendment to the Federal Constitution.

The forfeiture provision of Section 23 declares a *consequence* without pretending to establish any *procedure* for its enforcement. It provides that for a violation of Title II, a landlord may sue to procure a forfeiture of the lease; but it does not provide that he may sue in the Federal Courts, and the rule is well settled that "the right to sue does not imply a right to sue in the courts of the union, unless it be expressed". *Bank of the United States v. Deveaux*, 5 Cranch. 61, 86.

No one will claim that prior to the Eighteenth Amendment, Congress could have encroached upon the reserved,

exclusive right of the several states to regulate the tenure of real property within their limits and the modes of its acquisition, transfer and termination.

Authority for such encroachment must be found, if at all, in the second section of the Eighteenth Amendment, which gives concurrent power to the two sovereignties for the enforcement of the amendment. This Court has, however, already defined the significance of the concurrent power section in language which squarely condemns the interpretation put by the lower courts on the provision we are now considering. *National Prohibition Cases*, 253 U. S. 350, 387, where it was said:

"The power confided to Congress by that section, while not exclusive, is *territorially co-extensive* with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them."

In other words, its concurrent power enables Congress to go *into* the several states, from which it had theretofore been sternly excluded, and do acts for the purpose of enforcing the Eighteenth Amendment which theretofore would have been forbidden as matters solely of local and intrastate interest and jurisdiction. It does not and cannot give Congress a blanket authority to set up within each of the States a system of jurisprudence destructive of its established system and of its constitutional limitations. In the doing of acts intrastate, Congress still remains subject to the substantive and procedural limitations of state law. The object of the concurrent power provision was not to *destroy* state sovereignty, but as clearly said in the concurring opinion of Mr. Chief Justice White (253 U. S., at p. 391) "to *unite* national and state administrative agencies in giving effect to the Amendment".

The test of any Congressional exercise of power is the same under the Eighteenth Amendment as under any other

constitutional provision: Is the exercise of power appropriate or necessary to the accomplishment of the purpose? It was expressly so declared by Mr. Chief Justice White in the *National Prohibition Cases*, 253 U. S. at page 392, in which he limited the concurrent power of Congress "to the subjects *appropriate* to execute the Amendment as defined and sanctioned by Congress".

Surely, whatever may be said for the appropriateness or necessity of the *consequence* stipulated in Section 23 there is nothing to warrant in the slightest the contention that for the accomplishment of that consequence, it was necessary that a *procedure* should be adopted overriding the principle of law, "everywhere recognized, arising from the necessity of the case", that the creation, tenure and transfer of estates in land are subject exclusively to the laws of the state in which they lie. (*United States v. Fox*, 94 U. S. 315, 320.)

Especially should such a construction of the Congressional enactment be avoided, when there is nothing in the act which would suggest such an intent on the part of Congress.

V.

Moreover, in the absence of any showing of diversity of citizenship, the District Court had no jurisdiction to try this action between landlord and tenant.

(1) Diversity of citizenship is not pleaded, either in the complaint or in the cross-bill. There is no proof of such diversity. The Pall Mall Realty Corporation is a New York corporation (fol. 47).

(2) The mere fact that a claimed right is created by federal statute does not of itself give jurisdiction to the Federal Courts of an action to enforce such right, unless such jurisdiction is expressly conferred by the Act creating the right or by some other Act of Congress (Opinion of

Chief Justice Marshall in *Bank of the United States v. Deveaux*, 5 Cranch. 61, 86).

The forfeiture provision of Section 23 of Title II does not purport to vest the Federal Courts, whether at law or in equity, with jurisdiction to enforce the right which it creates. Nor is there any provision elsewhere in the National Prohibition Act giving the Federal Courts such jurisdiction.

In this respect Section 23 differs strikingly from Section 22, for in the latter, the United States is a party to the action by whomsoever the action is brought, so that the Federal Courts have jurisdiction as of course (Section 24 of the Judicial Code).

(3) Nor can the jurisdiction of the Federal Courts be enlarged by the fact that the landlord has proceeded by so-called cross-bill in a main action over which the Federal Court had jurisdiction. The jurisdiction of the Court must be tested just as though the landlord and the tenant were the only parties to the action.

In *Genera Furniture Company v. Karpen*, 238 U. S. 254, 259, this Court said that

"it hardly needs statement that the jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the court is without jurisdiction with one of which it has jurisdiction. Upon this point the rule otherwise prevailing respecting the joinder of causes of action in suits in equity must of course yield to the jurisdictional statute."

In *Vannerson v. Leverett*, 31 Fed. 376, it was held (to quote the headnote) :

"Where citizens of Georgia, who are partners, are both sued in equity in the courts of the United States, one of them cannot, by cross-bill against the other, litigate their disputes *inter sese*."

See also, *Patton v. Marshall*, 173 Fed. C. C. A. 350, 356.

(4) Moreover, the cross-bill does not constitute a suit arising under the Constitution or laws of the United States.

In *Cooke v. Arery*, 147 U. S. 373, 384, it was said:

"Whether a suit is one that arises under the Constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States."

It was so held again in *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 530:

"But a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, or validity or construction of the laws or treaties of the United States, upon the determination of which the result depends, and which appears in the record by plaintiff's pleading."

(5) Clearly, also, this was not an action for the enforcement of a penalty or forfeiture within the meaning of Paragraph 9 of Section 24 of the Judicial Code.

In the first place, forfeiture is *in rem*. The *res* must be effectively seized *before* the proceeding can come into existence.

In *Dobbins's Distillery v. United States*, 96 U. S. 395, 396, this Court said:

"Judicial proceedings *in rem*, to enforce a forfeiture, cannot in general be properly instituted until the property inculpated is previously seized by the executive authority, as it is the preliminary seizure of the property that brings the same within the reach of such legal process."

In the second place, if Congress was using the word "forfeiture" in Section 23 in its usual acceptance under the

Judicial Code, it would have provided machinery of seizure, either in an established and known form or according to some method laid down in the Act itself. In the present case, there was no preliminary seizure of the property. On the contrary, forfeiture was first declared by the decree, and seizure was directed to follow only in case the tenant did not vacate the premises.

Moreover, "condemnations and forfeitures are unknown in the practice of the United States courts, except upon specific proceedings against the property, and after the verdict of a jury". *The J. W. French*, 13 Fed. 916, 924; cited with approval in *In re Fasset*, 142 U. S. 479, 485.

In the third place, this cross-bill presents a purely private litigation between a landlord and his tenant.

In the fourth place, the cross-bill is not an action for the enforcement of a "penalty", because a penalty is a pecuniary mulct enforceable by an action of debt.

VI.

A construction of the forfeiture provision of Section 23 of Title II, which deprives the defendant therein of the right to trial by jury, condemns the provision as violative of the Seventh Amendment to the Federal Constitution guaranteeing trial by jury. Congress cannot be presumed to have intended such a result.

(1) The cross-bill contains no allegation that the landlord is without adequate remedy at law. It alleges repeated violations of the Prohibition Act, and the threat of their continuance; but these allegations are manifestly immaterial, since the action is not injunctive. The statute makes one past violation sufficient ground for forfeiture, and the threat of continued violations is no part of the cause of action. The cross-bill contains no allegation of fraud or other circum-

stance which inherently gives a court of equity power to forfeit, cancel or modify the leases in suit. The cross-bill is on its face a mere complaint in ejectment, or for dispossession of a tenant. It contains allegations which are apt and necessary for these remedies, and no allegations whatever upon which a court of equity could inherently take or exert jurisdiction.

Admittedly, the States may by statute enlarge the equity powers of their courts, so as to create new remedies enforceable in equity. But it is settled that the Federal courts cannot even apply such statutes, and cannot proceed under them, if the enlargement is one which contravenes the distinction between law and equity as established in the Federal courts by reason of the Seventh Amendment, and deprives litigants of their constitutional right to trial by jury.

Scott v. Neely, 140 U. S. 106, 109;

Cates v. Allen, 149 U. S. 451;

Pusey & Jones v. Hanssen, 261 U. S. 491.

In the first of these cases, this Court said :

“The general proposition, as to the enforcement in the Federal courts of new equitable rights created by the States, is undoubtedly correct, subject, however, to this qualification, that such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States. Neither such right nor such inhibition can be in any way impaired, however fully the new equitable right may be enjoyed or enforced in the States by whose legislation it is created. The Constitution, in its Seventh Amendment, declares that ‘in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved’. In the Federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact.”

In *Whitehead v. Shattuck*, 138 U. S. 146, the general principle of the *Scott* case was again affirmed, and a rule laid down which is squarely applicable to our case (p. 151) :

"It would be difficult, and perhaps impossible, to state any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; *but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class.* The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

(2) If Federal courts are inhibited by the Seventh Amendment from *merely applying* an enlargement of equitable jurisdiction created by competent State legislation, *a fortiori* are they inhibited from proceeding in violation of this Amendment in cases of claimed *original* Federal jurisdiction. It has been precisely so held in *Black v. Jackson*, 177 U. S. 349. The action in this case was for a mandatory injunction for the recovery of real property, and the Supreme Court of Oklahoma Territory had held that the defendant was not entitled to trial by jury. This Court reversed the decree *upon the precise ground that the Seventh Amendment applies to and is binding upon judicial proceedings in the Territories of the United States.*

Commenting upon the suggestion that equity might properly take jurisdiction because an action of forcible entry and detainer was not sufficiently speedy, this Court said (p. 363) :

"But the same reason could be urged to justify the extraordinary remedy of a mandatory injunction in

order to put a defendant out of possession, even where the plaintiff was entitled to maintain ejectment or an action in the nature of ejectment. The suggestion referred to leaves out of view the distinction made by the Constitution of the United States between cases in law and cases in equity. And it also fails to recognize the provisions of the Seventh Amendment securing the right of trial by jury in 'suits at common law' where the value in controversy exceeds twenty dollars. That Amendment, so far as it secures the right of trial by jury, applies to judicial proceedings in the Territories of the United States."

Squarely in point, again, is *Killian v. Ebbinghouse*, 110 U. S. 568, 572.

The present case, it is respectfully submitted, is squarely controlled by the foregoing decisions.

(3) As between this petitioner and his landlord, the only issue in this case was whether the landlord was entitled to repossess himself of the premises occupied by the petitioner. Under the Iowa statute, as has been pointed out, the landlord would have been required to proceed by action of forcible entry and detainer, and the petitioner would have had an absolute right to jury trial. Under the New York statutes, the landlord's remedy would have been in ejectment, or its statutory equivalent, summary dispossession proceedings. In either case the action would have been at law, and the parties would have been entitled as a matter of right to trial by jury. Bringing the action in the Federal court did not destroy that right; on the contrary, it could but strengthen it beyond all attack, by reason of the Seventh Amendment. As said in the leading case of *Lewis v. Cocks*, 23 Wallace, 466, 470:

"It is the universal practice of courts of equity to dismiss the bill, if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury."

And this is so, even if the point is not raised by demurrer, plea or answer, and is not suggested by counsel, and "notwithstanding the defendant has answered the bill, and insisted on matter of title."

Hipp v. Babin, 19 Howard, 271, 278;

Lewis v. Cocks, 23 Wallace, 466, 470.

VII.

Whether the forfeiture provision of Section 23 of Title II be considered an action of ejectment, or of forcible entry and detainer, or of forfeiture of an estate in lands, or as a penalty for violation of the law—and it can be but one or the other of these—a construction of that provision which abelishes the established jurisdiction of the law courts in respect thereof, and seeks to transfer such jurisdiction to the equity side is violative of Article III, Section 2 of the Federal Constitution, which requires Congress to recognize and maintain the distinction between cases in law and cases in equity.

(1) If the action by a landlord to expel his tenant under the forfeiture provision of Section 23 be considered an action of ejectment,—and this is perhaps its closest equivalent in the books,—it carried with it right of trial by jury. (Section 425 of the New York Civil Practice Act).

Such an action is triable only at law and before a jury in the Federal Courts as well.

Lewis v. Cocks, 23 Wall. 466, 470;

Hipp v. Babin, 19 How. 271, 276.

(2) If the action be considered one of forcible entry and detainer (as expressly provided in the parent statute in

Iowa), the right to trial by jury is equally clear, both in New York and in the Federal Courts. (*People v. Reed*, 11 Wend. 157, 159; N. Y. Civil Practice Act, Sections 1421 to 1428; N. Y. Real Property Law, Section 535).

(3) The absolute right to a jury trial under the New York Constitution is equally clear if the action be considered one of forfeiture. *Colon v. Lisk*, 153 N. Y. 188, 194.

Of the rights of a defendant in such a case in a Federal Court, Mr. Chief Justice MARSHALL said, in *The Sarah*, 8 Wheat. 391, 394:

"In the trial of all cases of seizure, on land, the Court sits as a Court of common law. * * * In all cases at common law, the trial must be by jury."

(4) So, also, if the action is to impose a penalty for violation of the law,—though it is difficult in the utmost to see how the action can possibly be so construed, since it is not an action of debt to mulct the defendant pecuniarily in an ascertained or ascertainable sum provided by the statute. If the action is for the recovery of a money penalty only, Section 425 of the Civil Practice Act, quoted above, governs; and as to penalties and forfeitures generally, see *Colon v. Lisk*, *supra*, 153 N. Y. 188.

The same thing is necessarily true in the Federal Courts, since the action is either in debt or *quasi-criminal*.

Boyd v. United States, 116 U. S. 616, 634;

United States v. Chouteau, 102 U. S. 603, 611;

Lipke v. Lederer, 259 U. S. 557, 561.

(5) We have limited our consideration to these four possible interpretations of the statute, because it is inconceivable to us what other known or definable legal character the action can be given. Clearly the forfeiture provision of Section 23 and the action thereunder have nothing to do with the abatement of nuisances,—in the first place, because the section deals with the abatement of *public* nuisances by

public officials only, and gives no right of abatement to private individuals; and in the second place, because the landlord is not required to prove the continuance of the alleged nuisance at the time of hearing, or any threat or probability or even any possibility of its continuance, and even the voluntary prior abatement of the nuisance is no defense. Equally clear is it that the action is not for the cancellation of the lease, for none of the usual elements of such an action, such as fraud, mistake or accident need be established, but the mere fact of one past violation ("*any violation*") of the statute is sufficient. Furthermore, neither the prayer for relief nor the decree in this case is limited to mere cancellation. The relief asked and given was, on the contrary, typical of actions for the recovery of possession of real property, namely, *ouster* and *repossession*.

VIII.

In view of the established principle that equity will relieve from forfeitures, but will not enforce them, it cannot be supposed that Congress intended to vest courts of equity with jurisdiction to enforce forfeitures under Section 23 of Title II, particularly if the section is to be construed—as, apparently, it was construed by the Trial Court—as depriving the Court of discretion and as being mandatory.

The Realty Corporation was emphatically not in court with clean hands or seeking or offering to do equity. The lease provided that the premises should be used "for a Men's Café and Hotel for Men" (R. 141). The Realty Corporation put the unwarranted interpretation upon this (R. 92) that it "prohibits the use of the leased premises for any purpose other than a hotel and saloon".

Apparently relying upon this misinterpretation of the

lease, the Realty Corporation (R. 92) had refused the petitioner permission even to take out the saloon fixtures and to change the premises into a cafeteria, as he was clearly entitled to do. The Realty Corporation had persistently refused to permit sub-letting of the premises. The uncontradicted evidence established a situation of such a character that even the Trial Court felt (R. 133) that "it is somewhat harsh perhaps to cancel (the lease) absolutely, running, as it does, for a great many years." But it seemed to the Court (R. 93) that "this provision of the statute is *mandatory*"; and the Court did not think (R. 133) that it had any discretion in the matter.

The extraordinary situation is thus presented that this statute is being interpreted so as not only to vest a court of equity with jurisdiction to declare a forfeiture, but, in addition, to deprive the Court of that element of discretion without which it is a sheer misnomer to call the proceeding one in equity.

The earlier rule was absolute and inflexible (*Marshall v. Vicksburg*, 15 Wall. 146, 149), that

"Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either."

This rule has been somewhat relaxed; but it is still true that forfeitures are never favored. *Henderson v. Carbondale Coal & Coke Company*, 140 U. S. 25, 33:

"Equity always leans against them, and only decrees in their favor when there is a full, clear and strict proof of a legal right thereto."

The reasons why equity always leans against forfeitures are peculiarly applicable to our case,—

"because forfeitures are usually harsh and oppressive and because they can ordinarily be enforced at law." (Mr. Justice VAN DEVANTER in *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 818 [8th C. C. A.]).

Congress must be presumed to have had this classic antagonism against forfeiture in mind when, in enacting this provision of Section 23, it *expressly refrained from vesting jurisdiction of actions thereunder in equity*. On the other hand, if it be contended, nevertheless, that Congress meant to vest equity with this jurisdiction, it cannot be supposed for a moment that it also intended to deprive the Court of that flexibility and discretion which has been called "the beautiful character or pervading excellence, if one may say so, of equity jurisprudence". *Story Eq. Jur.*, Section 439, quoted with approval by Mr. Justice VAN DEVANTER, in *Brewster v. Lanyon Zinc Company*, *supra*, 140 Fed. 801, 819.

In either event, the construction put upon the statute by the courts below was serious error. The question is one of frequent recurrence and grave importance. It merits the first consideration of this Court.

IX.

Section 23 of Title II does not operate retroactively. It does not affect leases made prior to its adoption, and under the Constitution could not affect them.

(1) The petitioner's first lease for the premises was made April 20, 1916. A supplemental lease was entered into July 27, 1916. Both leases were in existence and effect prior to the adoption of the Eighteenth Amendment and before the enactment of the National Prohibition Act.

There is nothing in the forfeiture provision of Section 23 to indicate that Congress intended it to apply to existing leases. This, of itself, is sufficient to take such leases out of the statute.

In *Shreveport v. Cole*, 129 U. S. 36, 43, this Court said, by Mr. Chief Justice Fuller:

"Constitutions as well as statutes are construed to operate prospectively only, *unless, on the face of the instrument or enactment, the contrary intention is manifest beyond reasonable doubt.*"

In *City Railway Co. v. Citizens Railroad Co.*, 166 U. S. 557, 565, this Court said of the statute there under consideration that

"it certainly should not be construed to act retrospectively or to affect contracts entered into prior to its passage, unless its language be so clear as to admit of no other construction * * *. There is always a presumption that statutes are intended to operate prospectively only * * *."

(2) Moreover, a construction of the statute, which makes it applicable to existing contracts, would condemn it as unconstitutional.

If the State of New York had enacted the legislation we are considering, it is not seriously open to dispute that as to existing contracts it would have been held unconstitutional, under the provision of Section 10, Article I, that "No state shall * * * pass any * * * law impairing the obligation of contracts."

Brine v. Insurance Company, 96 U. S. 627;

Barnitz v. Beverly, 163 U. S. 118, 122;

In re Ayers, 123 U. S. 443, 504;

State Tax on Foreign Held Bonds, 15 Wallace, 300, 320.

In the last cited case, this Court said, Mr. Justice Field writing:

"A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligations, * * *."

In *In re Ayers*, 123 U. S. 443, 505, this Court said:

"In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. *Louisiana v. New Orleans*, 102 U. S. 203. That obligation, by virtue of the provision of Article I,

Section 10, of the Constitution of the United States, cannot be impaired by any subsequent state legislation. *Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement.*"

(3) It is no answer to this difficulty to say that the act we are considering is an Act of Congress, and that Article I, Section 10, applies only to the States. In enacting this statute, Congress purported to exercise its concurrent power to enforce the Eighteenth Amendment. Otherwise Congress could no more have legislated with respect to the terms of leases and the conditions of their forfeiture than, under its power to regulate interstate commerce, it was able to regulate child labor within the several states. *Hammer v. Dagenhart*, 247 U. S. 251. On the other hand, in exercising its power to act within the State, Congress must necessarily proceed within the same limitations which would have governed any State which had itself undertaken such legislation.

It would be monstrous to suppose that Congress has been vested with the powers of the States, without the fundamental restraints which have always accompanied them. And yet this is precisely what must be contended if the forfeiture provision of Section 23 is not only to be sustained as valid legislation, but, in addition, is made to apply to leases executed and in force before the Eighteenth Amendment and before the National Prohibition Act. As said by this Court in *Keller v. United States*, 213 U. S. 138, 149:

"While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced."

X.

The leases in suit were executed April 20, 1916, and July 27, 1916, respectively. The Prohibition Act did not become a law until October 28, 1919.

The Act of Congress limits itself to legislating a new substantive covenant, by way of new ground for forfeiture, into these leases. It says nothing about remedies for breach; and it was not intended to, and does not, disturb the limitations contemplated by the parties when they executed these leases.

Parties to a contract procure rights thereunder, of co-ordinate importance, to both the affirmative obligations of the contract and to the mode of enforcement in existence when the contract is made.

Brine v. Insurance Company, 96 U. S. 627, 637;

Barnitz v. Beverly, 163 U. S. 118, 122.

Manifestly Congress was legislating only with respect to the affirmative obligations imposed by leases, and not at all with respect to the mode or procedure for their enforcement. The forfeiture provision of Section 23 is silent as to remedies for its breach. There is nothing to indicate that Congress intended to affect the mode of enforcement in any manner whatever.

XI.

If the forfeiture provision of Section 23 of Title II can be construed as a criminal penalty for violation of the law, it is unconstitutional under the prohibition against excessive fines and cruel or unusual punishment. At least its application to the present case is unconstitutional for this reason, for it imposes a penalty of \$250,000.

An officer of the United States Government who uses his position for the purpose of extortion, is subject to a maximum fine of \$500.

A member of Congress who takes a bribe for procuring a contract, etc. is liable to a fine of not more than \$10,000. An officer who knowingly makes a false acknowledgment may be fined not more than \$2,000.

A fine of \$5,000 is imposed for falsely making, forging, counterfeiting, or altering letters patent granted or purporting to be granted by the President of the United States.

Conspiracy to commit an offense against the United States is punishable by fine of not more than \$10,000.

If the forfeiture provision of Section 23 can be considered a fine for violation of the National Prohibition Act, this petitioner has been fined \$250,000. There is no reason under the forfeiture provision why the fine may not be several times that amount, for only the accident of the value of this lease limited the mulct to \$250,000. "It is to be remembered that the question (of constitutionality) is to be determined not by what has been done under (the Act) in any particular instance, but by what may be done under and by virtue of its authority." (*Colon v. Lisk*, 153 N. Y., at p. 194.)

Of such a statute the aptest possible comment is the lan-

guage of this Court in *Weems v. United States*, 217 U. S. 349, 366, *et seq.*:

"Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."

In that case a comparison was made by this Court between the penalty before the Court and penalties for other offenses; and it was said (p. 381):

"And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."

XII.

The lack of jurisdiction of the Trial Court to try an action under the forfeiture provision of Section 23 of Title II was clearly raised and incorrectly decided. Even, however, if the point had not been suggested in any manner, it was the duty of the Court *sua sponte* to recognize it and give it effect, and to dismiss the Realty Corporation's cross-bill for lack of jurisdiction.

While this action was still pending on the calendar and before trial, petitioner moved for trial by jury (fol. 70); but his motion was denied by the Court (fol. 123). At the trial, petitioner objected to the admission of any evidence in support of the Realty Corporation's cross-bill (fol. 378), but was overruled and duly excepted. The petitioner raised the point again at the end of the entire case, but was again overruled by the Court (fol. 600, *et seq.*).

Moreover, it was apparent on the face of the bill that the action was not properly triable in equity. Hence, the Court should, of its own motion, have sent the action to the law side for trial before a jury, or dismissed the bill without prejudice.

In *Lewis v. Cocks*, 23 Wall. 466, 470, this Court held that an action of ejectment would have been an adequate remedy for the complainant, and directed dismissal of the bill for that reason. Mr. Justice SWAYNE said:

"In the present case the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel, nevertheless if it clearly exists it is the duty of the court *sua sponte* to recognize it and give it effect."

In *Hipp v. Babin*, referred to by Mr. Justice SWAYNE (19 How. 271, 276), it appeared that the jurisdiction of the court had been admitted during a litigation of more than ten years, and that no objection to the jurisdiction was raised by the pleadings or on the argument of the case in any court. Nevertheless, this Court affirmed a decree dismissing the bill, because the action was (p. 277) "in substance and legal effect, an ejectment bill." The Court quoted as applicable authority Section 16 of the Judiciary Act of 1789, now Section 267 of the Judicial Code, with only an immaterial change of a few words:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

And the obligation upon the Federal Court to take cognizance, of their own motion, of the fact that the action is not properly in equity, is now embodied in Rule 22 of the New Federal Equity Rules, as follows:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

CONCLUSION.

The judgments of the Circuit Court of Appeals and of the District Court should be reversed and the cross bill of the respondent Pall Mall Realty Corporation for forfeiture and cancellation of the lease of the petitioner dismissed.

Respectfully submitted,

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ALFRED J. TALLEY,
Of Counsel.

Office Supreme Court, U. S.
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NO. 101

In the Supreme Court of the United States

OCTOBER TERM, 1926

JAMES DUGAN, APPELLANT

**UNITED STATES OF AMERICA AND PAUL MALL REALTY
CORPORATION**

**ON APPEAL FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT AND PETITION
FOR WRIT OF CERTIORARI TO THAT COURT**

BRIEF FOR THE UNITED STATES

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1926

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 101

JAMES DUIGAN, APPELLANT

v.

UNITED STATES OF AMERICA AND PALL MALL REALTY
CORPORATION

*ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT AND PETITION FOR
WRIT OF CERTIORARI TO THAT COURT*

BRIEF FOR THE UNITED STATES

In so far as the decree in this case ordered the padlocking of the premises, the case is moot, as the record indicates that the decree was not superseded and has been executed.

In so far as the decree determined that a nuisance existed and that a permanent injunction should be issued against it, it does not seem to be assailed. The appellant's brief, in specifications of error to be assigned, Nos. 1, 2, 6, and 8 seems to raise the question, but all argument is directed to the question of the cancellation of the lease. The assignments of error on which the case was presented to the Circuit Court of Appeals are not given in the record. All points relating to the decree in so far

as it determined that a nuisance existed and that a permanent injunction should be issued seem to be abandoned in this case. Further, if the point is insisted on that a jury trial should be granted on whether a nuisance existed, the point is so unsubstantial as not to require argument. See *Thomas Murphy et al. v. United States*, No. 443, October Term, 1926, decided December 6, 1926.

The only question of any substance remaining for consideration is whether the provision in Section 23 of the National Prohibition Act, providing for forfeiture of leases, is appropriate and valid legislation for the enforcement of the Eighteenth Amendment, and, incidentally, whether a cross bill for cancellation of the lease by the lessee is proper in an abatement suit, and whether trial of that issue must be by jury.

These questions have been ably dealt with in the brief for the Pall Mall Realty Corporation, and it may be taken for granted that there is nothing to add to what the distinguished counsel for that appellee has to say on the subject.

The case for the United States is accordingly submitted on the brief for the Pall Mall Realty Corporation.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

DECEMBER, 1926.

No. [REDACTED]

101

Office Supreme Court, U. S.
FILED

MAY 23 1925

WM. H. STARR, JR.

**In the Supreme Court of the
United States.**

OCTOBER TERM—[REDACTED] 1925

JAMES DUIGNAN,

Petitioner,

against

UNITED STATES OF AMERICA, PALL
MALL REALTY CORPORATION,

Respondents.

**Brief on Behalf of Pall Mall Realty
Corporation in Opposition to Peti-
tioner's Application for a Writ of
Certiorari.**

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JOHN W. DAVIS,
Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM—1924.

JAMES DUGNAN, Petitioner, against UNITED STATES OF AMERICA, PALL MALL REALTY CORPORATION, Respondents.	}
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Brief on Behalf of Pall Mall Realty Corporation in Opposition to Petitioner's Application for a Writ of Certiorari.

Stripped of all unnecessary verbiage, the petitioner apparently assigns four reasons in support of his contention that this writ should be granted:

(A) That he was entitled to and was wrongfully denied a trial by jury.

(B) That the forfeiture clause of the National Prohibition Act was not intended to be retroactive—it did not affect leases made prior to its adoption.

(C) That petitioner's lease was so valuable to him, its forfeiture for continuous violations of the National Prohibition Act constitutes cruel and unusual punishment, and that portion of the act decreeing forfeiture is, therefore, unconstitutional; and

(D) That there is a conflict in the decisions of the courts as to the question of procedure which merits the consideration of this court.

Statement of Facts.

A brief recital of the established facts will be necessary. The petitioner was the tenant of the *entire* building, 655-657 Eighth Avenue, Manhattan, New York City. The respondent, Pall Mall Realty Corporation, was and is the owner and the landlord of the said premises. The proceedings were brought by the United States Government by the issuance of a citation on the 18th day of October, 1923 (fols. 22-38). Thereafter, upon motion of the United States an order was made dated the 23rd day of October, 1923, making the Pall Mall Realty Corporation an additional party defendant and amending the bill of complaint to include such additional defendant and alleging its ownership of the premises, etc. (fols. 40-43).

The petitioner interposed a general denial to the bill of complaint.

The respondent Pall Mall Realty Corporation interposed an answer consisting of denials (fols. 53-55) and of a separate defense (fols. 56-59) which alleged that it was the landlord of the

premises and Duignon the tenant thereof, that Duignan was in occupation and possession of the premises and in full control thereof and that upon being informed of the violations of the National Prohibition Act upon the premises, it had notified the tenant that it elected to cancel the lease. In addition to the denials and separate defense and by way of cross-bill, the respondent Pall Mall Realty Corporation alleged the lease to Duignan (fols. 60-61), the possession of the premises by Duignan thereunder (fol. 62) the subsequent purchase by it of the premises (fol. 63), upon information and belief the violation of the National Prohibition Act by the petitioner Duignan (fols. 63-64), a decree by the United States District Court for the Southern District of New York, dated January 3, 1923, adjudging the *premises occupied by Duignan to have been a common nuisance upon February 16th, 17th, 18th and 24th, 1922, and also upon March 1st and 2nd, 1922* (fols. 64-65), and, upon information and belief, violations of the Prohibition Act by the petitioner Duignan subsequent to such decree (fols. 65-66). The answer prayed for the dismissal of the complaint as to it and for affirmative judgment upon its cross-bill cancelling the lease, pursuant to Section 23 of Title II of the National Prohibition Act (fols. 66-67).

The petitioner was served with a copy of this respondent's cross-bill, but he failed to interpose an answer although he recognized it by moving for an order framing the issues thus raised, in order to aid the conscience of the Court as we shall hereafter show.

The trial was had before Honorable John C. Knox, District Judge for the Southern District

of New York. The Government called six witnesses on its behalf; the petitioner Duignan called eight witnesses; and the respondent Pall Mall Realty Corporation three witnesses. Three witnesses testified that they had bought whiskey in the premises over a period from May 26th to June 8th, 1923 (pp. 43, 54, 95 et seq.). Three vials of liquor purchased upon the premises and subsequently delivered to and examined by the United States Chemist, who pronounced the samples to be whiskey, were placed in evidence (pp. 44, 84, 99). Two witnesses, Federal Prohibition Agents, testified to having searched the premises on March 24, 1922, pursuant to a search warrant and having found *twenty-four two ounce bottles of gin and three half pints of whiskey in a drawer of a dresser in Room 7* and in a closet in the same room *two quart bottles and one five-gallon bottle and about two gallons of whiskey and one pint of gin* (fols. 380 and 411). There was also placed in evidence a decree *pro confesso* entered on the 3rd day of January, 1923, in a suit brought by the United States of America against James Duignan and Claude Capponi, adjudging the premises involved herein to have been a common nuisance on the 15th, 16th, 17th, 18th and 24th of February and the 1st and 7th days of March, 1922, and enjoining the manufacture, sale and storing of intoxicating liquor on the premises (fols. 667-672).

Such facts proved conclusively that intoxicating liquors, as defined by the National Prohibition Act, had been sold continuously in the premises for a period of a year and a half.

In support of the cross-bill of the respondent Pall Mall Realty Corporation, it was shown that

the corporation was the landlord of the premises (fols. 107-108); that the corporation was given notice by the Police Department of the City of New York of the violations of the liquor Law upon the premises (fols. 673-678); that immediately upon receipt of such notice the corporation notified the tenant Duignan of its intention to cancel the lease (fols. 679-681) and that when Duignan refused to quit the premises summary proceedings were instituted in the Municipal Court of the City of New York (fols. 77, 78, 110, 493, 494).

The petitioner Duignan attempted to prove—and he now asserts—that the lease of the premises was of great value in support of his plea that he should not be deprived of it, but his expert, when questioned by the court, was forced to admit that the value of the said lease was negligible (fols. 443-445).

The facts proven on the trial showed petitioner to have been a contumacious violator of the National Prohibition Act.

In 1920.

On May 27th, 1920, his bartender was arrested and subsequently convicted on a plea of guilty of having violated the Act, as petitioner swore in his own affidavit (fol. 80) and testified upon examination (fol. 506).

In September, 1920, petitioner himself was "subpoenaed" and forced to put up bail—i. e., arrested (fols. 504-506).

Another bartender, Paul Paponi, also pleaded guilty and went to jail (fols. 507-508).

In 1921.

On May 31, 1921, another of Duignan's men Simon Pigasei, was arrested for violation of the Act and he also pleaded guilty (fol. 80).

On two separate occasions actions were brought against the petitioner for injunctions (fols. 509).

In 1922.

In an equity action against Duignan and Capponi (Tony) the petitioner appeared by Mr. Donnellan but failed to answer and his hotel was found to have been a nuisance on February 15th, 16th, 17th, 18th and 24th, 1922, and on March 1st and 7th, 1922, by reason of illegal sales of liquor having been made on those dates (fols. 370, 371, 667 to 672). Judgment *pro confesso* was taken against him for having violated the Prohibition Act on all of those dates. His default has never been opened and that judgment stands in full force (fol. 371). By that judgment he was enjoined from further sales of liquor in the premises. In spite of this injunction and in spite of all these warnings, repeated insistently, petitioner chose to ignore the law and set himself up as one superior to it. His attitude is shown by the fact that the very bar fixtures that he installed in pre-prohibition days never were removed but the premises presents the same old picture of a corner saloon (fols. 358 and 471).

In 1923.

The evidence of Reager (pp. 43 *et seq.*), O'Connor (pp. 54 *et seq.*), Westing (pp. 95, *et*

seq.), Barry (pp. 126, *et seq.*) and Jackers (pp. 137 *et seq.*) clearly showed that Duignan was continuing his violations even after the injunction of 1922 and until at least June 8th, 1923 (fols. 292, 293).

Petitioner knew the value of his lease; if he now must suffer the consequences of his violations, he has no one but himself to blame.

ARGUMENT.

POINT I.

Answering Petitioner's Points First, Second, Third, Fourth, Sixth and Seventh that he was deprived of his constitutional right to trial by jury.

The petitioner contends that the trial of the cross-bill interposed by this respondent should have been had before a jury at law. But the petitioner submitted to the jurisdiction of equity without raising this question, and accordingly he is now too late to raise the objection, even if it had any merit. Three months before the trial took place, after issue had been joined and action was pending, he *served notice of motion to have the issues framed for a trial by jury*. His affidavit upon that motion clearly showed that what he desired then was solely a jury in equity to advise the conscience of the court. At folio 84 will be found his request in the following language:

"That this request is made because your deponent believes that a jury of twelve men

can be of assistance in advising the court as to the credibility of the witnesses, who will be numerous upon this trial".

This motion was addressed mainly to the issues raised by the cross-bill, for the moving affidavit treats entirely of such issues.

On the trial counsel for the petitioner cross-examined all of this respondent's witnesses and offered testimony in support of his contention that equity should not decree cancellation of his lease as prayed for in this respondent's cross-bill.

At the close of the entire case the appellant made a motion to dismiss the proceeding as properly triable before a jury (fol. 601) but such motion was fatally defective and appellant had to choose either one of the two dilemmas. If he construed the motion as relating back to his previous motion in January, the situation was not aided for then, like such previous motion, it would deal solely with a jury trial in equity, and as a jury trial in equity is purely a matter of discretion with the trial court, its denial did not constitute error.

Cochran v. Deener, 94 U. S. 780.

If, however, he maintained that his motion was an entirely new one for a jury trial at law, it came too late for it is well settled that such a motion must be made at least before a party has entered upon his case.

Kilbourne v. Sunderland, 130 U. S. 505;
First Savings Bank & Trust Co. v. Greenleaf, 294 Fed. 467;

Royal Union Mutual Life Insurance Co.
v. Lloyd, 254 Fed. 407;
So. Pacific Ry. v. U. S., 133 Fed. 651,
 669 (C. C. A. 9th Circuit).

In the case of *Wylie v. Core*, 15 How. 415,
 Justice McLean said, at page 420:

"The want of jurisdiction if relied upon
 by the defendant, should have been alleged
 by plea or answer."

In the case of *Insley v. U. S.*, 150 U. S. 512,
 Justice Brown said, at page 515:

"Even an objection that an action should
 have been brought at law instead of in
 equity may be waived by failure to take ad-
 vantage of it at the proper time;"

and Justice Brewer also said in *Hollins v. Brief-
 field Coal & Iron Co.*, 150 U. S. 371, at page 381:

"If there was a defense existing to the
 bills as framed, an objection to the right of
 these plaintiffs to proceed on the ground
 that their legal remedies had not been ex-
 hausted, it was a defense and objection which
 must be made *in limine*."

Whatever the motions made by petitioner were,
 they certainly were not motions to transfer the
 proceeding upon the cross-bill to the law side of
 the court, and accordingly they will in no case
 avail him.

On this point Judge Trieber in the case of
Fay v. Hill, 249 Fed. 415, at page 418, said:

"The fact that the plaintiff had a complete and adequate remedy at law is no longer ground for demurrer or motion to dismiss. *The proper procedure is to move to transfer it to the law side. Equity Rule 22. Failure to make such a motion and proceeding to a hearing was a waiver.*" (Italics ours).

As was said by Hough, C. J., in his opinion in this case:

"Exactly what appellant (petitioner here) meant by his motion for a jury trial is not clear from the record. If his thought was to try before a jury the issue of nuisance, the motion had no foundation in law.

The applicable sections of the National Prohibition Law have a long legal history. The legal concept of extending by legislative fiat the definition of a public nuisance to something theretofore legal, and then calling upon equity to abate it, is found in the Kansas Statute of 1885, quoted by Harlan, J. in *Mugler v. Kansas*, 123 U. S. 623, at 670; and is there expressed in a form distinctly more violent than are the nuisance sections of the Volstead Act. The thoroughness with which the Supreme Court upheld the Kansas method, has been the sustaining foundation of prohibitory legislation of sundry kinds for forty years, while as for jury trials, we quoted the rule in the *Reisenweber* case (*United States v. Reisenweber*, 288 Fed. 520) at page 523; and it is that when the legis-

lature constitutionally extends the definition of public nuisance to anything, such new-born nuisance, being created for destruction, may be destroyed *without jury intervention*.

If, however, Duignan's motion be thought to be confined to the case raised by the cross-bill, he was not in a position to make the motion for he never answered or otherwise raised an issue with the Realty Co.

If he had answered on the merits and tried the case without denying jurisdiction, he would be concluded under *Southern Pacific Co. v. United States*, 133 Fed. 651, and cases cited; and *a fortiori* is he concluded by trying the case fully while in default for want of an answer."

Even if the petitioner had answered and then properly moved for a transfer of the action to the law side of the court and for trial by jury, he would have met defeat if this court is to sustain the decision in the cases of

Grossman v. U. S. ex rel Brundage, 280 Fed. 683, and

U. S. v. Boynton, 297 Fed. 261.

In the Grossman case an appeal was had to the Circuit Court of Appeals for the 7th Circuit from a decree in an equitable suit to abate a nuisance, pursuant to Title II of the National Prohibition Act, which decree directed the cancellation of the tenant's lease, upon the prayer of the landlord's cross-bill. In that suit, as in this one, the owners of the premises were made

defendants along with the tenant, who, it was charged, was maintaining a nuisance on the leased premises. The complaint therein prayed that the nuisance be abated and that the premises be closed for a period of one year. To the granting of this last sought relief the landlords were opposed. They pleaded their ignorance of the actions and conduct of the tenant and the conditions existing in the leased premises. They set forth all of the facts showing ownership, lease, etc., and prayed that if the tenant was maintaining a nuisance or disobeying any injunctive order of the court, his lease be cancelled. In their prayer for relief they asked "that the lease may be cancelled and declared forfeited as against said Grossman". Such was the identical prayer of the landlord herein. Evans, C. J., at page 685, disposed of the contention that the Court in Equity could not grant such relief to the landlord, as follows:

"Coming to the allegation of the bill, we find the situation somewhat unusual. The owners were not in possession of the premises. The tenant Grossman was charged by the Government with a violation of the National Prohibition Act and the maintenance of a nuisance. This charge he denied. The owners, professing to be law abiding citizens, desirous of respecting the law, anxious to protect their property, but uncertain as to the facts, answered in the equity suit and asserted that they were innocent of any wrongdoing and that they wished the lease terminated, and prayed for its termination and the ouster of the co-defendant Grossman.

These facts, if established, would appeal favorably to a court of equity. The court might not conclude to dispossess the landlord, if it appeared that he was innocent of the uses to which his property was being put by the tenant and manifested a desire to co-operate in abating the nuisance * * *.

His attitude toward the tenant, after being informed of the latter's misconduct, might, and probably would, be determinative of the state of his mind and his knowledge of the tenant's wrongdoing; for it is hardly conceivable that a law-respecting landlord would not avail himself of the above-quoted provision of the National Prohibition Act and seek to oust the tenant upon discovering that his premises were being maintained as a nuisance by such tenant. On the other hand, the landlord who repudiates the tenant's action immediately upon learning of the facts, and who at the first opportunity avails himself of a remedy open to him to oust the tenant from the premises, necessarily places himself in a position of vantage when it comes to the terms of the decree finally entered.

We have, then under consideration a cross-bill where the subject matter is germane to that of the original bill. The relief sought was expressly provided for by the statute * * *.

We conclude that the allegations in the cross-complaint were sufficient to support the decree; that it constituted an election to terminate the lease because of the tenant's

violations of the law; that it was a relief which the court was permitted to grant in a suit of this character."

On appeal the petitioner attempted to avoid the determination in the Grossman case by stating that therein an answer to the cross-bill was made, while herein there was ~~no~~ such answer. But that is a distinction without a difference for as stated in the Grossman case "the defendant was not deceived by the pleadings". In the instant case the cross-bill was served personally upon him and while he interposed no formal answer to it, he was permitted upon the trial to and he did introduce evidence in an endeavor to defeat the cross-bill (folios 430 to 445 and 454 to 470). He also cross examined all the landlord's witnesses, and three months before the trial he served notice upon the landlord of a motion for a jury trial in *equity* (folios 70, 72). The petitioner's affidavit upon this motion recognized the issues raised by the landlord's cross-bill. It stressed (fols. 76-77) the value of his leasehold—which of course would have no bearing if it were not for the prayer of the landlord-made much of the landlord's defeated attempts to obtain a trial in the Municipal Court of the City of New York of a dispossess proceeding (fols. 77-78) and stated specifically what relief the landlord sought in his cross-bill (fol. 82) thereby nullifying any possible plea of surprise or ignorance.

The Boynton case (District Court, E. D. Michigan) dealt at great length with contentions identical with those raised by this petitioner

and the entire opinion therein is illuminating upon all such contentions. That was a landlord's motion for permission to intervene by cross-bill in an equity suit brought to abate a nuisance under the National Prohibition Act and seeking affirmative relief cancelling the lease to the other defendant. The only difference between that case and this case is that therein the landlord petitioned to become a party, while herein the landlord had no choice in the matter, but was brought in by the United States Government (fols. 40-48). The same contentions were raised therein as those raised in the court below, but District Judge Tuttle, at page 269, held:

"They (the landlord) have the right unless and until it be waived, to terminate any such lease held by such a lessee and to have such right enforced by cross-complaint in this suit."

District Judge Tuttle in his opinion further stated, page 268:

"Is it proper practice for the interveners to file a cross-complaint for affirmative relief against other defendants? As already noted, the National Prohibition Act, in Section 23 of title 2 provides that:

'Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease'.

It is also there provided that an action to enjoin a nuisance under the statute 'shall be brought and tried as an action in equity.' It is settled equity practice to permit a defendant in a suit to seek relief against another defendant in such suit with respect to a matter germane to the subject thereof. The practice is recognized in general equity rule 30, providing that:

'The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit.'

In the present case the very facts relied on by the plaintiff in support of the decree sought by it might also entitle the intervenors to the relief prayed by them. The situation renders the right to set up the cross complaint in question peculiarly applicable and appropriate. (*Grossman v. United States*, 280 Fed. 683 (C. C. A. 7).

Such practice enables the government and the innocent lessor of premises used as a nuisance under the National Prohibition Act to co-operate to the advantage of both. In the one suit, the existence of the nuisance (if any) may be proved, the good faith of the lessor established, the nuisance which offends both the government and such lessor abated (by the closing of the premises for a sufficient period to accomplish that result), the lease which has enabled the tenant to commit such nuisance may be terminated, such tenant removed, and the

premises restored to the possession and control of such lessor, subject to his giving the bond prescribed by the National Prohibition Act."

Judge Knox recognized that the Grossman case was controlling, for in his opinion in this case he stated, at folios 628-630:

"As for the propriety of awarding the landlord affirmative relief, I think it, too, should be granted. See *Grossman v. United States*, *supra*. The statute is without ambiguity with respect to a lessor's right to declare the forfeiture of a lease of premises wherein a tenant commits a nuisance, as defined by the Section 21 of the Act. The provision is as follows:

'Any violation of this title upon any leased premises by the lessee or occupant shall, at the option of the lessor, work a forfeiture of the lease.'

Congress doubtless assumed that many leases would have substantial value, and for that reason probably believed that such fact would tend to deter lessees from violating the law and thus jeopardizing their property rights. It was reasonably to be supposed that the more valuable the lease, the greater would be the disposition of the lessee to see that it was not subjected to forfeiture.

Duignan was chargeable with knowledge of the consequences that might arise from his disregard of the law. Nevertheless, he

chose to conduct his business in almost open defiance of both the statute and his lease, and it is with poor grace that he now seeks to avert the impending loss of his lease. The evidence plainly showed that he took his chances with an enforcement of the law, and the assertion by his landlord of its statutory rights; he did so deliberately and the lease which he now prizes so highly, and which, to be preserved, required only an observance of the law must, now pass from him."

POINT II.

Answering Petitioner's Points Ninth and Tenth that Section 23 of Title II of the National Prohibition Act was not retroactive—it did not affect leases made prior to the passage of the Act.

This contention is raised for the first time in this court. It was not raised on the trial nor was it presented to the Circuit Court on Appeal.

The errors presented to the Circuit Court for review were:

- (1) Finding the existence of a nuisance.
- (2) Sustaining the cause of action set out in the cross-bill, and,
- (3) Denying a trial by jury.

But even though it had been raised in the courts below, it is without merit. The peti-

tioner and his attorneys have evidently overlooked the provisions of the lease between the parties, paragraph Twenty-three reading as follows:

"Twenty-third: The *Tenant* hereby covenants and agrees to comply in all respects *with the provisions of all future and present laws* relating to the traffic in or sale of liquors and the taxation and regulation of the same, or the regulation of the use and occupation of the demised premises, and to promptly execute and comply with any and all rules, orders and regulations of the State Commissioner of Excise, and of any and all other officers, bureaus and departments of the Borough of Manhattan and the City, County and State of New York with respect to any of the foregoing matters. * * * (fol. 662)"

It can hardly be argued seriously that it was the intent of Congress that only leases made after the passage of the Act should be affected by the so-called forfeiture clause of the Act. If such was the intent the Act would be without the teeth necessary for its enforcement. The statute is plain and without ambiguity with respect to a landlord's right to declare a forfeiture when the tenant maintains a nuisance upon the demised premises. Section 23 of the Act provides that:

"Any violation of this title *upon any leased premises* by the lessee or occupant shall, at the option of the lessor, work a forfeiture of the lease."

As Judge Knox said in his opinion rendered on the decision in this case in the District Court (fol. 629):

"Congress doubtless assumed that many leases would have substantial value, and for that reason probably believed that such fact would tend to deter lessees from violating the law and thus jeopardizing their property rights. It was reasonably to be supposed that the more valuable the lease, the greater would be the disposition of the lessee to see that it was not subjected to forfeiture."

The cancellation was clearly justifiable as one means of abating the nuisance and also as incidental relief afforded the landlord under the doctrine that "*equity delights to do justice and not by halves*" and that "*equity will grant complete relief between the parties.*"

In *Camp v. Boyd*, 229 U. S. 530, at page 552 Justice Pitney said:

"One of the duties of such a court (equity) is to prevent a multiplicity of suits and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes *even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority.* *Oelrichs v. Spain*, 15 Wall, 211, 228; *Holland v. Challen*, 110 U. S. 15, *Regnes v. Dumont* 130 U. S. 354, 393, *Kilbourne v. Sunderland*, 130 U. S. 505."

A portion of Mr. Justice Harlan's opinion in *U. S. v. Union Pacific Ry. Co.* 160 U. S. 1, deals with the general principles involved herein; at page 50, he said:

"It cannot be doubted that the Government could lawfully proceed by mandamus against the railway company for the purpose simply of compelling it to perform any duty imposed by its charter or by statute. But that remedy would not afford the United States the full relief to which it is entitled. Here are agreements between the railway company and the telegraph company that are wholly inconsistent with the present claims of the Government. Until cancelled because inconsistent with the Act of 1888, and prejudicial to the rights of the Government and the public by a decree to which the telegraph company is a party, those agreements constitute an obstacle in the way of the enforcement of that Act, and the protection of those rights. In a mandamus proceeding by the Government against the railway company, the telegraph Company could not properly be made a defendant, and no judgment in mandamus as between the United States and the railway company, would conclude the rights of the telegraph company. The United States is certainly entitled to the interposition of equity for the cancellation of the agreements under which the telegraph company asserts rights inconsistent with the act of 1862 and the acts amendatory thereof as well as with the act of 1888. Jurisdiction in equity be-

ing acquired for that purpose, the court, in order to avoid a multiplicity of suits, can proceed to a decree that will settle all matters in dispute between the United States, the railway company and the telegraph company which relate to the general subject of telegraphic communication between the points named by Congress. Consequently a decree cancelling the agreements of 1866, 1869, 1871 and 1881, by reason of their being in the way of the full performance by the railway company of the duties imposed by the act of 1888 may also require the railway company to obey the directions of Congress as given in the last named Act."

and at page 51:

"* * * In *Boyce v. Grundy*, 3 Pet. 210, 215, this Court said: 'It is not enough that there is a remedy at law. It must be plain and adequate or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' The circumstances of each case must determine the application of the rule. *Watson v. Sutherland*, 5 Wall, 74, 79. In *Oelrichs v. Spain*, 15 Wall, 211, 228 an objection was raised that the remedy at law was ample. The court, observing that the remedy at law was not as effectual as in equity, said, among other things, that a 'direct proceeding in equity will save time, expense, and a multiplicity of suits and settle finally the rights of all concerned in one litigation'. The final

order in a proceeding by mandamus against the railway company would not conclude the rights of the telegraph company. Nor would a suit in equity by the telegraph company against the railway company conclude the rights of the United States. But a suit in equity by the United States against both companies for the purpose of annulling the agreements under which the telegraph company claims rights adverse to the United States, can embrace all the matters in controversy and authorize a comprehensive decree that will terminate all disputes among the parties as to such matters. *Cosens Mining Co. v. South Carolina*, 144 U. S. 550, 567."

In *Gormley v. Clark*, 134 U. S. 338, Chief Justice Fuller, at page 347, dealt with the question as follows:

"The subject received much consideration from Judge Blodgett, holding the Circuit Court for the Northern District of Illinois, in *Smith v. Gage*, 11 Bissell. 217, 220, in which he announced substantially the same conclusions. And he remarks 'that the court on the final hearing of such a case, may, in its discretion, as a court of equity, where two conflicting titles are presented, the validity of which can be determined in a court of law by the express terms of its decree, remit the parties holding such titles to a court of law for the trial of their rights, but this would be purely a matter of equitable discretion, and does not limit the power

of the court in this proceeding to settle the entire title by its decree'. In Gage v. Caraher, ubi supra, the Supreme Court of Illinois says: 'Whatever may be the power of the court of chancery, where there are controverted titles, to restore by its decree the evidence of title in the respective parties as they were before the destruction of the record, and then, in its discretion, remit the parties to a court of law, to there try their titles, it is manifest no such course was contemplated by the statute or necessary in cases under it'. p. 452.' (Italics ours.)

and Chief Justice Fuller in the same case on the question of the power of a court of equity to grant full relief, at page 349, among other things, said:

"It is strenuously insisted that the remedy of law was adequate, and that as the right of possession was purely a legal question and for a jury, the Court of Chancery should have declined jurisdiction; but, inasmuch as the case came within the provisions of the statute, *and equity could alone afford the entire relief sought, the fact that legal questions were also involved could not oust the court of jurisdiction.* The jurisdiction in equity attaches unless the legal remedy both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances. *Kilbourn v. Sunderland*, 130 U. S. 503, 514."

It is no answer to say that the relief herein granted the landlord was tantamount to ejectment, for such relief has been granted in equity as incidental from time immemorial. *Chanslor-Canfield Midway Oil Co. v. United States* 266 Fed. 145 and *Gormley v. Clark*, (*supra*) are two such cases. A number of English cases on the subject are:

Dormer v. Fortescue (1744) 3 Atkyns, 123;
Owen v. Griffith (1749) 1 Vesey, 249;
Wrixon v. Colter, 1 Ridgeway, 295;
Chetham v. Hoare, 22 Law Times Report, N. S. 57.

The case of *Dormer v. Fortescue*, *supra*, was to compel delivery of a deed and Lord Chief Justice Hardwicke therein at page 132 said:

"If the trustees had been made parties to it the court might have decreed possession and a conveyance of the trust estate if they thought it a clearpoint for the plaintiff."

Owen v. Griffith (*supra*) was a bill to have an account taken and for relief and satisfaction in the nature of a redemption of an estate upon an elegit and defendant was decreed to deliver up a possession after the Master had reported back as to the amount of rents.

It is hard to conceive of any relief being more germane and incidental than that of the cancellation of Duignan's lease. The very facts which would prove the Government's case were sufficient to prove the landlord's in so far as

the tenant was concerned. To compel the landlord to resort to a separate trial at law would be idle and useless practice and merely lead to a multiplicity of suits for the fact of the violations would be *res adjudicata* between the landlord and the tenant and there would be no question of fact for a jury to determine.

This was clearly seen by the learned Judge in the Boynton case (*supra*) and again we quote his words (page 268)

"In the one suit, the existence of the nuisance, if any, maybe proved, the good faith of the lessor established, the nuisance which offends both the Government and such lessor abated (by the closing of the premises for a sufficient period to accomplish that result), the lease which has enabled the tenant, to commit such nuisance may be terminated, such tenant removed, and the premises restored to the possession and control of such lessor, subject to his giving the bond prescribed by the National Prohibition Act."

It was altogether fitting and proper that Congress should provide that Equity have power to cancel leases existing at the time of the passage of the Act because under the Act violations of it by a tenant might compel an innocent landlord to suffer. It is provided in the Act that the property used in the manufacture and sale of intoxicating liquor, including the building in which it is sold, may be seized and sold by the Federal authorities. Nothing that a landlord might do could prevent such confiscation of his property were it not for

this provision of the act permitting cancellation of the lease. No relief could be had at law to prevent such a loss of the innocent landlord's property, and accordingly the act provides for such protection by granting the power to cancel the lease.

The landlord could bring no action at law in ejectment as the tenant held under a subsisting lease. The relationship of landlord and tenant continued to exist until the cancellation of the lease by the court. This relationship was a recognition by the defendant Duignan of the title in the Pall Mall Realty Corporation. As there was no dispute of title until the cancellation, the landlord could bring no action in ejectment until the lease was cancelled for it is essential to an ejectment action that there be a dispute of title. The only course left open to the landlord was to have the lease decreed cancelled; and as a court of law has no such power, he was forced to resort to equity for his relief.

POINT III.

Answering Petitioner's Point Eleven and the statement contained in his petition that the lease in question was of the value of \$250,000 and its forfeiture for continuous violation of the Act constituted cruel and inhuman treatment which renders that portion of the Act unconstitutional.

Petitioner at page 2 of his petition and again under his Eleventh point attempts to

create the impression that the "uncontradicted evidence" showed that the "unexpired term" of his lease was of the reasonable market value of \$250,000 and that before going into possession he had expended \$62,500 in fitting the premises for occupancy.

As to the value of the lease.

That this lease was of any value is doubtful. The building was an old four-story brick one with 53 rooms, three baths and six showers (fol. 443). Rooms rented for eight and nine dollars a week and twelve dollars if occupied by two persons. Transient roomers paid \$1.50 per day (fols. 524-528); meals were thirty to forty cents (fol. 530). A hotel? No, merely a lodging house. Even petitioner's real estate expert who tried his best to make the lease appear to be a valuable one was forced to admit that it had no value. He testified in answer to questions put to him by the court (fol. 444):

"I do not suppose that there would be any rental value as of today."

and again (fol. 445):

"I do not know as it would have any rental value at all. I do not know who would go in there."

The petitioner should gain no sympathy through his claim that the value of his cancelled lease was great. In the first place the testimony showed that his lease was far from

valuable. It is well known that motor boats and other boats of a value many times that of this lease have been seized by the Government and sold. The Biltmore Hotel had a valuable bar, so did the Manhattan, the Knickerbocker and the Astor; and there were very many profitable saloons of large proportion in the City of New York and very valuable saloon leases in existence before prohibition. All these hotels and saloons were forced to close their bars, and did so. Why should this petitioner be given special consideration? He must have known of the value of his lease before he flouted the law, but as heretofore shown, he flaunted his disregard for the Act for four years, and we do not believe that he is now in a position where he should be heard to whimper because of possible disaster that he brought down about his head.

As to petitioner's investment of \$62,500.

At page 6 of the petition the statement is made that \$62,500 was expended by the petitioner in fitting up the premises for his use, he evidently having forgotten his testimony on the trial at fol. 455 of the record that such sum was expended not only in remodeling but in the purchase of "*the furniture, linen and everything in the place.*"

Judge Knox before whom this case was tried in the District Court was not unaware of petitioner's claim that this lease was a valuable one and that he had expended money in order to fit it for use as a cafe, and on that very point at fol. 629 in his opinion said:

"Congress doubtless assumed that many leases would have substantial value, and for that reason probably believed that such fact would tend to deter lessees from violating the law and thus jeopardizing their property rights. It was reasonably to be supposed that the more valuable the lease, the greater would be the disposition of the lessee to see that it was not subjected to forfeiture.

Duignan was chargeable with knowledge of the consequences that might arise from his disregard of the law. Nevertheless, he chose to conduct his business in almost open defiance of both the statute and his lease, and it is with poor grace that he now seeks to avert the impending loss of his lease. The evidence plainly shows that he took his chances with an enforcement of the law, and the assertion by his landlord of its statutory rights; he did so deliberately and the lease which he now prizes so highly, and which, to be preserved, required only an observance of the law, must now pass from him."

POINT IV.

Answering petitioner's contention that there is a conflict in the decisions of the courts on the question of procedure under Section 23 of Title II of the Prohibition Act.

The petitioner contends at pages 9, 10 and 11 of his petition that there is a conflict in the

decisions of the courts on the question of the procedure to be adopted in administering the provisions of the Act in question, but he fails to note the all important distinction that there is no *conflict between courts of concurrent jurisdiction*. The cases cited by him show that there is no conflict between Circuit Courts of Appeal but only between the Circuit and one District Court.

The case of *Grossman v. United States ex rel Brundage*, 280 Fed. 683 was passed upon by the Circuit Court of Appeals, 7th Circuit and until that decision is reversed, it stands as the Country's law upon the subject. The case of *United States v. Boynton, et al.*, 297 Fed. 261 was decided by the District Court for the Eastern District of Michigan and the decision there is in harmony with the Circuit Court's decision in the Grossman case.

The case of *United States v. Lot, 29 etc., City of Omaha*, 296 Fed. 729 was a Federal Court case (District of Nebraska) and the opinion of Judge Woodrough in that case was *dicta* only. There was no question before the court in that case between landlord and tenant under Section 23 of Title II of the Prohibition Act, nor was any proof offered of *continued violations* and maintenance of a nuisance.

Judge Knox had in mind the decision of Judge Woodrough in the last cited case when writing his opinion in this case. Referring to the decision of Judge Woodrough he said:

"Furthermore, attention was called to the decision of Judge Woodrough, of the Dis-

trict of Nebraska in the case of *United States v. Maier*, filed March 7, 1924, wherein he held the provisions of the Prohibition Law under which this suit was brought, to be unconstitutional, and I was desirous of learning his reasons for such conclusion. The opinion is now before me, and has been considered.

The facts before Judge Woodrough were quite different from those here presented. In his case, the nuisance had ceased to exist. In this suit, the nuisance, I am ready to believe, continued down to the date upon which the bill was filed. Indeed, I have no doubt it continued to the date of trial. If under such circumstances, the decision has any present applicability, I must dissent therewith. But whatever may be the necessary inferences to be drawn from the language employed by the Court in the *Maier* case, its holding to the effect that Section 22 of the National Prohibition law is unconstitutional and void, cannot be followed. The point is no longer arguable in this circuit. See *United States v. Reisenweber*, decided by the Circuit Court of Appeals upon January 18, 1923, where it was said:

'It is equally free from doubt that Congress has the constitutional power to authorize that an action to enjoin the nuisance can be brought in any court having jurisdiction to hear and determine equity cases as provided in Section 22.''' (fols. 625, 626).

It must be apparent to this court that there is no conflict in the decisions of Courts of concurrent jurisdiction on the question involved.

POINT V.

The petition for a writ of certiorari should be denied.

Dated, New York City, May 20th, 1925.

Respectfully submitted,

LESLIE & ALDEN,
Solicitors for Respondent,
Pall Mall Realty Corporation.

JOHN W. DAVIS,
Of counsel.

IN THE
Supreme Court of the United States,

OCTOBER TERM, 1926.

No. 101.

JAMES DUIGNAN,

Appellant,

VS.

UNITED STATES OF AMERICA and PALL MALL
REALTY CORPORATION,

Appellees.

ON APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND PETITION FOR
WRIT OF CERTIORARI TO THAT COURT.

**BRIEF FOR APPELLEE PALL MALL
REALTY CORPORATION.**

JOHN W. DAVIS,
Attorney for the Appellee,
Pall Mall Realty Corporation.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1926.

On Appeal from United States Circuit Court of Appeals
for the Second Circuit and Petition for Writ of
Certiorari to that Court.

JAMES DUIGNAN

Appellant,

VS.

UNITED STATES OF AMERICA and
PALL MALL REALTY CORPORATION,
Appellees.

No. 101.

**BRIEF FOR APPELLEE PALL MALL
REALTY CORPORATION.**

Opinions Below.

This is an appeal from a decree of the Circuit Court of Appeals for the Second Circuit entered February 9, 1925, (R., 152) pursuant to an opinion rendered February 2, 1925, (R., 150), reported 4 Fed. (2d) 983.

The case came to the Circuit Court of Appeals on an appeal from the decree of Judge Knox of the Southern District of New York entered March 28, 1924, (R., 2) pursuant to an opinion rendered March 20, 1924 (R., 137) not officially reported.

Jurisdiction of this Court.

This appeal was taken under the provisions of former Section 241 of the Judicial Code, 26 Stat. 828, providing for a right of appeal to this Court from a Circuit Court of Appeals in any case in which the decree of the latter Court is not made final, and where the matter in controversy exceeds \$1,000. Inasmuch as the decree appealed from was entered February 9, 1925, the right to review was not affected by the Act approved February 13, 1925, repealing Section 241, Section 14 of which provided that that Act should not affect the right to a review of any judgment or decree entered prior to the effective date of the Act, which was May 13, 1925. 43 Stat. 942.

The suit was brought by the United States against the appellant to abate a nuisance under Section 2 of Title II, of the National Prohibition Act, 41 Stat. 314, (R., 4). By an amended bill of complaint, the appellee, Pall Mall Realty Corporation, lessor of the premises, was made a defendant (R., 7). The Corporation answered admitting the allegations of the complaint relating to the nuisance alleged, and by way of cross-bill against the appellant, asked for a decree under Section 23 of Title II of the National Prohibition Act, 41 Stat. 314, cancelling the lease and declaring the same to be forfeited (R., 9). The District Court enjoined the appellant, padlocked the premises and granted the affirmative relief sought by the Corporation (R., 2). The Circuit Court of Appeals affirmed this decree (R., 152). It thus appears that the case was not one coming within the provisions of Section 128 of the Judicial Code as they read prior to the Act of February 13, 1925, making the decrees of Circuit Courts of Appeals final in cases in which the jurisdiction was based upon diversity of citizenship, and in cases arising under the patent laws, copyright laws, revenue laws, criminal laws, and in admiralty. 26 Stat. 828.

A petition for a Writ of Certiorari was filed by the appellant herein, No. 1163, October Term, 1924. On June 1, 1925, this Court postponed consideration of the petition until the hearing of the case on appeal.

The appellee does not question the right to appeal, and therefore respectfully suggests that the petition for Certiorari be denied.

Statement of the Case.

The statement of the case in the appellant's brief, page 4, relates the facts giving rise to the suit, but does not accurately describe the decision of the Circuit Court of Appeals, from which this appeal is taken.

The appellant relies for his right to attack the constitutionality of the forfeiture provision of Section 23 upon his general objection to the introduction of evidence in support of the Realty Corporation's affirmative case (R., 81); upon a motion for a jury trial made at the outset of the Government's case (R., 12); and upon a motion to dismiss the cross-bill made at the conclusion of the testimony on the ground that Section 23 is unconstitutional and that the proceeding was "properly triable before a jury" (R., 133). These motions were denied and exceptions noted.

The Circuit Court of Appeals found difficulty in determining just what the appellant meant by his motion for a jury trial, but held that if it was directed to the case raised by the cross-bill as a challenge to the jurisdiction of equity, the appellant was not in a position to make the motion because of his failure to answer that cross-bill or otherwise to raise an issue with the Realty Corporation. The Court held that by his failure to plead, the issue of a want of jurisdiction in equity by reason of an adequate remedy at law, was not before it. The Court did not discuss the constitutionality of Section 23.

The appellant's argument is confined to the issue of the constitutionality of Section 23 and the proceedings there-

under. Nevertheless, the specification of assigned errors includes objections to the Decree awarded the Government, closing the premises, upon the ground that the evidence failed to show a nuisance within the meaning of the statute (p. 9).

In reciting the facts relating to the cancellation of the lease, it is stated on page 5 of the brief that the testimony showed without contradiction that the premises had an annual rental value of \$39,000 a year, the inference being that it was highly inequitable to cancel a lease calling for a rental of \$14,000 per year, which had until April 30, 1936, to run. However, in answer to questions put by the Trial Judge, the witness who had testified to the \$39,000 figure, stated that unless the premises were altered he did not suppose they had any rental value, and in answer to another question put by the Trial Judge he ventured to appraise the hotel value at about \$16,500 a year (R., 96).

Questions Involved and Summary of Argument.

The question in this case so far as appellee, Pall Mall Realty Corporation, is concerned, is whether a lessor, named as a defendant in a suit in equity to abate a nuisance under the National Prohibition Act, may be granted a decree in response to his cross-bill, cancelling the lease under Section 23 of the National Prohibition Act (41 Stat. 314).

The appellant contends that such relief is not authorized by this Statute; that a District Court of the United States has no jurisdiction to grant such relief; that if the Statute so authorizes, it is unconstitutional; that in any event the lessee is entitled to a jury trial upon the issues raised by the cross-bill, because that cross-bill sought relief in the nature of ejectment.

The appellee Realty Corporation contends that such relief is germane to the proceeding and is therefore entirely appropriate; that equity in such a case has full jurisdiction to grant

relief to all parties; that the Statute so permits and it is constitutional; that cancellation has long been a recognized head of equity jurisdiction and therefore that the refusal to grant a jury trial was entirely proper; that appellant by failing to answer the cross-bill and to challenge the jurisdiction of equity on the ground of an adequate legal remedy, tendered no issue of want of jurisdiction in Equity, and hence cannot demand a jury trial on that theory or make the point here.

POINT I.

Section 23 of the National Prohibition Act, 41 Stat. 314, gives a Lessor the right to cancel the lease of the premises upon which a violation of the Act by the lessee or occupant has occurred.

The language of the section reads:

"Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease." (41 Stat. 314.)

In the present case, the District Court found a violation of the Statute, enjoined the appellant lessee from any further violations, ordered that the premises be not occupied or used for six months, and directed the appropriate Federal Officers forthwith to lock and seal all the entrances and exits so as effectually to prevent use or occupancy for any purpose whatsoever for a period of six months (R., 2).

Such finding and decree clearly import a material violation of the Statute. The Circuit Court of Appeals quite properly held that the evidence in support of this conclusion was adequate. *Wiggins v. United States*, 272 Fed. 41; *United States v. Reischenreber*, 288 Fed. 520.

No question is raised as to the materiality of the violation nor is any doubt suggested that the words "any violation" cover the nuisance found to exist herein and enjoined.

The Court is not called upon therefore to construe the words "any violation" as it was in *United States v. Zerbey and National Surety Company*, 271 U. S. 332. Indeed, the brief for the appellant does not challenge the finding that a violation occurred.

No further discussion is necessary to establish the unmistakable right of the lessor at his option to declare a forfeiture of the lease under Section 23. The words of the statute are clear.

POINT II.

The right of cancellation may be enforced without trial by jury through an equity decree responding to a cross-bill by a defendant lessor in a suit to abate a nuisance brought by the United States under Section 22 of the National Prohibition Act.

The instant proceeding was brought by the United States under Section 22 of the National Prohibition Act (41 Stat. 314) to abate a nuisance defined in the statute. Section 22 expressly provides:

"Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases."

There can be no doubt under this section of the jurisdiction of a District Court of the United States sitting in equity. *Murphy v. United States*, No. 443, October Term, 1926, decided December 6, 1926.

The defendants named in the proceeding were the tenant, appellant here, and the lessor, appellee Realty Corporation. The Realty Corporation filed a cross-bill setting up its lease, denying that it suffered the premises to be occupied or used in violation of the National Prohibition Act, and averring

its prompt election upon being apprized that intoxicating liquors were being sold upon the premises, to cancel the lease pursuant to its rights under Section 23 of the Act (R., 9). It prayed that a decree be entered cancelling the lease and directing the ouster of the tenant and repossession by the lessor (R., 11). The relief sought by this cross-bill was entirely germane to the main proceeding, and therefore properly was granted. Upon this ground in four cases involving identical situations, lower Federal Courts have entertained such cross-bills and have decreed the relief therein sought.

In *Grossman v. The United States*, 280 Fed. 683 (7th C. C. A., 1922), the United States brought a proceeding to abate a nuisance under the National Prohibition Act against a tenant and his landlord. The landlord by cross-complaint sought a decree cancelling the lease which was granted upon a finding that the nuisance existed. Upon appeal this decree was sustained by the Circuit Court of Appeals, the Court saving at page 686:

"We have, then, under consideration a cross-bill where the subject-matter is germane to that of the original bill. The relief sought was expressly provided for by the statute. Irrespective of the provisions of the National Prohibition Act, a landlord leasing premises for lawful purposes would be entitled to a termination of the lease, in case the tenant violated the law and maintained a nuisance upon the premises. The defendant Grossman was not deceived by the pleading, for he answered the cross-complaint as well as the original complaint fully, and denied the misconduct with which he was charged.

We conclude that the allegations in the cross-complaint were sufficient to support the decree; that it constituted an election to terminate the lease because of the tenant's violations of the law; that it was a relief which the court was permitted to grant in a suit of this character."

Likewise in *United States v. Boynton*, 297 Fed. 261 (E. D. Mich., 1921), the United States filed a bill to enjoin a nuis-

ance under the National Prohibition Act against the tenant, other holders of leasehold interests in the premises, and the holders of the record title. A party claiming in right of certain leases and by operation of law to have become the landlord of the premises was permitted to intervene and file a petition in the nature of an answer and cross-complaint, asserting its claim as landlord, its election to forfeit the lease, and its prayer that the Court declare cancellation and that the intervenor be placed in immediate possession. The Court decided that the intervention was proper upon the ground that the intervenor had a clear interest in the subject of the suit, and that the affirmative relief sought in the cross-bill was entirely appropriate to the issues raised in the main proceeding. The Court indicated that the relief prayed by the intervenor should not be granted until all the evidence respecting the nuisance had been presented, but if this evidence resulted in a finding that a nuisance existed, the Court held that it had full jurisdiction to decree the relief sought by the landlord. The Court said at page 268:

"It is settled equity practice to permit a defendant in a suit to seek relief against another defendant in such suit with respect to a matter germane to the subject thereof. The practice is recognized in general equity rule 30, providing that:

'The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit.'

In the present case the very facts relied on by the plaintiff in support of the decree sought by it might also entitle the intervenors to the relief prayed by them. The situation renders the right to set up the cross-complaint in question peculiarly applicable and appropriate."

In the Second Circuit, *United States v. Archibald*, 4 Fed. (2d) 587, decided by Judge Augustus N. Hand in the District Court for the Southern District of New York, and *United States v. Gaffney*, 10 Fed. (2d) 694, decided by the

Circuit Court of Appeals, held that the landlord was entitled to cancellation in response to his cross bill.

In line with these decisions and pursuant to settled equity practice, the District Judge entertained the cross-bill in the present case and held that he had jurisdiction to decree the relief sought therein. This was clearly proper. The relief sought by the landlord was germane to the nuisance proceeding. Its adjudication did not require the expansion of the issues raised by the bill. As Judge Hand said in *United States v. Archibald*, 4 Fed. (2nd) 587, 588:

"The landlord is brought into a suit affecting his premises, and for the purpose of closing them up. If he can get no relief of a speedy nature in the action itself, he will be put in a position where the decree closing the premises impairs the earning capacity of his tenant, and leaves him with a lease which he cannot get rid of in the court in which the suit is brought. It seems to me that the rights invoked by the government, the rights of the tenant, and the rights of the landlord, and the relief sought for or against these parties, are matters germane to the suit brought, and such rights were properly so described by the Circuit Court of Appeals of the Seventh Circuit. *U. S. v. Grossman*, 280 Fed., at page 686."

Moreover, it is not only appropriate but settled equity practice for the Court to do full justice between all the parties properly before it.

Dewing v. Perdicaries, 96 U. S. 193, 197;

Gormley v. Clark, 134 U. S. 338, 349;

United States v. Union Pacific Ry., 160 U. S. 1, 52;

Chanslor-Canfield Oil Co. v. United States, 266 Fed. 145 (Ninth C. C. A.);

The landlord as a party to the proceeding was entitled to have any of its rights, relevant to the issues raised therein, finally settled.

Furthermore, cancellation of a lease of this character is a familiar head of equity jurisdiction and therefore it was entirely proper for the District Court to enter its decree in favor of the landlord. *United States v. Union Pacific Ry.*, 160 U. S. 1, 52; *Louisville, etc. Ry. Co. v. Louisville Trust Company*, 174 U. S. 552, 567.

These familiar powers of a court of equity are not diminished by the absence in Section 23 of express language describing the proceeding by which the forfeiture was to be enforced. Congress left open the method of enforcement and landlords are entitled to assert their rights under the statute in any proceeding which they may elect and which is appropriate. The elimination in the statute of any definition of the proceeding, such as occurs in the Iowa statute, which the appellant asserts was the pattern for Section 23, indicates a Congressional purpose not to follow that statute in confining the remedy to an action at law.

Jurisdiction in Equity Was Not Ousted by the Fact That Similar Relief Might Have Been Sought in an Action at Law.

Nor will the fact that the relief sought by way of cross-bill might also be obtained in an action at law, oust a court of equity of its jurisdiction to decree that relief. It is assumed for purposes of this argument that the defendant tenant is in a position to set up here the existence of a remedy at law to defeat the jurisdiction in equity. It is to be noted, however, that he failed to raise this issue by any pleading and it will be argued subsequently that this failure on his part bars him from objecting now to equity jurisdiction upon this ground (*Infra*, p. 26).

The adjudication of the issue raised by the cross-bill was precisely within the language of Mr. Justice Pitney, in *McGowan v. Parish*, 237 U. S. 285, 296.

"The simple issue that remained was, of course, of such a nature that it would have been the proper subject of an action at law, had it not originally been bound up with questions appropriate for decision by an equitable tribunal. But 'a court of equity ought to do justice completely, and not by halves;' and a cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority. *Camp v. Boyd*, 229 U. S. 530, 551-552, and cases cited."

In the present case the relief sought by the landlord is clearly "bound up with questions appropriate for decision by an equitable tribunal"—i.e., the issuance of an injunction against a nuisance. The length and scope of the injunction directing the padlocking of the premises was of immediate concern to the landlord and his endeavor to cancel the lease under Section 23, bore directly on the effect of that injunction. In the discretion of the court, upon the filing of sufficient bond, a tenant may be repossessed of the premises and the injunction run only personally against him. See *Murphy v. United States*, No. 443, October Term, 1926, decided December 6, 1926. Clearly the landlord had a vigorous interest in the controversy and his prayer for relief was directed to preserving his interest therein. Therefore, it was entirely proper that equity take cognizance of the issues raised by the cross-bill and settle the entire proceeding. The fact that those issues might have been raised in an action at law does not oust equity's jurisdiction. In *Camp v. Boyd*, 229 U. S. 530, 552, Mr. Justice Pitney said:

"One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority. *Oelrichs v. Spain*, 15 Wall. 211, 228; *Holland v. Challen*,

110 U. S. 15; *Reynes v. Dumont*, 130 U. S. 354, 395; *Kilbourn v. Sunderland*, 130 U. S. 505, 514; *Gormley v. Clark*, 134 U. S. 338, 349."

See, also,

Osborne & Co. v. Barge, 30 Fed. 805, 806 (C. C., N. D. Iowa 1887).

*The Relief Sought by the Cross-Bill Was Appropriately
Granted by a Court of Equity.*

Manifestly the granting of the relief sought by the landlord worked no forfeiture which a court of equity might hesitate to effect. The statute in unmistakable words gives to the landlord the right to cancel at his option. When a court of equity enforces that right no inequitable forfeiture results.

It is well settled that forfeitures imposed by statute for violations of law are of the character of public penalties and courts are not at liberty to modify their incidence.

Maryland v. Baltimore & Ohio Railroad Co., 3 How. 534, 552;

Clark v. Barnard, 108 U. S. 436, 457;

Powell v. Redfield, 4 Blatchford, 45.

Moreover, the lease here in question carried an express provision in its 23rd Article (R., 144) in which the tenant covenanted and agreed "to comply in all respects with the provisions of all present and future laws relating to the traffic in or sale of liquors, and the taxation and the regulation of the same, or the regulation of the use and occupation of the demised premises." Upon a violation of this covenant the landlord would have been entitled to prosecute ouster proceedings under the laws of the State of New York. Civil Practice Act, Sections 990 *et seq.*; 1410 *et seq.* There is nothing either harsh or inequitable in visiting the appellant's violation of this express covenant with the consequences announced by the Federal Statute.

The language of District Judge Knox fairly describes the appellant's position. "Duignan was chargeable with knowledge of the consequences that might arise from his disregard of the law. Nevertheless he chose to conduct his business in almost open defiance of both the statute and his lease, and it is with poor grace that he now seeks to avert the impending loss of his lease" (R., 138).

The traditional reluctance of an equity court to lend its assistance in enforcing a forfeiture may not be invoked to deny the relief accorded the appellee in the present case. Where the right is clear, and the aid of equity is invoked in the public interest, the fact that a forfeiture is being decreed is no reason to withhold relief.

In *Kern River Co. v. United States*, 257 U. S. 147, the United States sought by a bill in equity to cancel grants covering the right-of-way for a canal, upon the ground that the land was being used for developing electric power instead of for irrigation purposes, and that an implied provision of the grant gave the United States the right to forfeit for this misuse of the property. It was contended that equity should not enforce the forfeiture. Replying to this contention, Mr. Justice Van Devanter, said at page 155:

"The appellants invoke the rule that a court of equity usually is reluctant to lend its aid to enforcing a forfeiture. But where, as here, the right to the forfeiture is clear and is asserted in the public interest, equitable relief, if otherwise appropriate, is not withheld. *Farnsworth v. Minnesota & Pacific R. R. Co.*, 92 U. S. 49, 68; *Union Land and Stock Co. v. United States*, 257 Fed. 635."

So here, equitable relief, clearly appropriate, and asserted in the public interest, will not be withheld upon the ground that a forfeiture is being imposed.

POINT III.

Section 23 of the National Prohibition Act is not unconstitutional when construed as authorizing the relief granted herein.

It is contended that Section 23, if construed to authorize the relief sought in the present case, is unconstitutional, upon the ground that the Eighteenth Amendment confers no power upon Congress to authorize such relief, and that the section so construed violates the guaranty of a jury trial in civil cases assured by the Seventh Amendment.

These contentions, if open at all to the appellant, rest wholly on a motion made at the close of the case to dismiss the cross-bill on the ground that Section 23 "is unconstitutional" (R., 133). There was no pleading by the appellant to support this motion. The argument submitted *infra* under Point IV establishes that these contentions are not open to the appellant. The Circuit Court of Appeals did not consider them. Since the decision appealed from, however, the Circuit Court of Appeals for the Second Circuit has considered and sustained the constitutionality of Section 23, in *United States v. Gaffney*, 10 Fed. (2d) 694.

The Cancellation of the Lease Is An Appropriate Means of Enforcing the Eighteenth Amendment.

The Eighteenth Amendment provides in Section 2:

"The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The constitutional inquiry is whether the statute in question may be said reasonably to carry out by appropriate means the power conferred upon Congress by the Constitution. In deciding whether the cancellation of a lease

covering premises upon which a violation of the statute has occurred is a means reasonably appropriate to carry out the prohibitions of Section 1 of the Amendment, every presumption will be made in favor of validity of the statute.

In the *National Prohibition Cases*, 253 U. S., 350, 387, it was held that Section 2 of the Eighteenth Amendment empowers Congress to enforce the prohibitions of the amendment "by appropriate means". In the concurring opinion of Mr. Chief Justice White, at page 392, he outlined his views as to the effect of Section 2 in the following language:

"Limiting the concurrent power to enforce given by the second section to the purposes which I have attributed to it, that is, to the subjects appropriate to execute the Amendment as defined and sanctioned by Congress, I assume that it will not be denied that the effect of the grant of authority was to confer upon both Congress and the States power to do things which otherwise there would be no right to do."

Ever since the decision in *Mugler v. Kansas*, 123 U. S. 623, there can be no doubt that abatement by injunction of a nuisance of the character described in the National Prohibition Act, is an appropriate and effective means to carry out constitutional prohibitions.

Murphy v. United States, No. 443, October Term, 1926, decided December 6, 1926, is the latest decision of this Court sustaining the abatement of a nuisance by injunction.

The forfeiture of a lease is a means no less appropriate to carry out the prohibitions of the first section than the authorizing of a court of equity by perpetual injunction to abate a nuisance. Especially is that true where as here the identical facts sufficient to support the injunction will support the landlord's right to declare a forfeiture.

The "padlock" injunction, so-called, may and frequently does deprive the tenant of all use or enjoyment of the premises during its continuance. Where the duration of the injunction and the life of the lease are co-extensive, mani-

festly the tenant suffers no double loss if his lease is declared forfeit at the same time. In such a case one method of enforcement is the exact equivalent of the other. If the lease by its terms outlives the injunction, the tenant may—or may not—suffer a further loss of property, but it is one imposed upon him by way of penalty designed to render a renewed violation impossible at the spot and by its deterrent effect improbable elsewhere.

The decisions in the lower Federal courts in which the question has been raised are as above stated unanimously in favor of the validity of Section 23. *Grossman v. United States*, 280 U. S. Fed. 682 (7th C. C. A.); *United States v. Boynton*, 297 Fed. 261 (E. D. Michigan); *United States v. Archibald*, 4 Fed. (2d) 587 (S. D. N. Y.); *United States v. Gaffney*, 10 Fed. (2d) 694 (2nd C. C. A.).

United States v. Lot 29 etc., City of Omaha, 296 Fed. 729, (D. Nebraska) is not to the contrary. There was no dispute between landlord and tenant in that case.

In passing on the constitutionality of Section 23 in *United States v. Gaffney*, 10 Fed. (2d) 694, 696, Judge Hough said:

"In considering jurisdiction over this particular kind of statutory nuisance, it is well to remember * * * that jurisdiction in equity to restrain and abate nuisance is much older than the Volstead Act; that the right of any tenant to retain possession of the leased premises depends upon his observance of the covenants in the lease, both express and implied; and that every lease contains an implied obligation that the lessee shall use the property legally and for lawful purposes. * * * When that covenant was broken by the tenant, all right to maintain the lease as against the landlord was gone; and it was assuredly within the power of the nation to aid the landlord to recover his premises, by a method well known to the law, and not created by the amendment."

*Forfeiture of Property Has Long Been a Recognized Method
of Compelling Obedience to Prohibitory Legislation.*

Since the earliest acts of Congress, it has been a constant policy to insure the enforcement of prohibitory legislation by prescribing forfeitures of goods or property involved in the violation. The number of such instances is legion, and a few of them are set forth below to illustrate the long established practice which is further evidence of the reasonableness of the means adopted in Section 23 for visiting a penalty upon a violator of the law.

In the Act approved October 20, 1914, c. 330, 38 Stat. 741, providing for the leasing of coal lands in Alaska by the Secretary of the Interior, Section 14 provided that any such lease might be "forfeited and cancelled by appropriate proceeding in a court of competent jurisdiction whenever the lessee fails to comply with any provision of the lease or of general regulations promulgated under this Act." (38 Stat. 745).

Revised Statutes, Section 3405, being the Act approved June 30, 1864, 13 Stat. 263, provided that any person who purchases or receives for sale any cigars, from any manufacturer who has not paid a special tax provided in such cases should be liable to a penalty of \$100, "and to a forfeiture of all the said articles so purchased or received, or of the full value thereof."

Copyrighted books introduced into this country in violation of the Copyright Laws are subject to forfeiture under the Act of March 4, 1909, c. 320, Section 32, 35 Stat. 1083, providing that such books "shall be seized and forfeited by like proceedings as those provided by law for the seizure and condemnation of property imported into the United States in violation of the Customs Revenues Laws." This section was sustained in an opinion of the Attorney General reported in 22 *Op. Attorney General* 29, 70 (1898).

The legislation relating to the forfeiture of vessels engaged in smuggling, or entering American ports without complying with the proper registry requirements is voluminous, and goes back at least as far as the Act of March 2, 1799.

Thus Revised Statutes, Section 3095, being Section 92 of the Act of March 2, 1799, c. 22, 1 Stat. 697, provided that no merchandise of foreign manufacture subject to the payment of duties should be brought into the United States from any foreign port in any other manner than prescribed by the statute:

"Under the penalty of seizure and forfeiture of all such vessels and of the merchandise imported therein."

Section 69 of this early statute, 1 Stat. 678, provided for the forfeiture of any merchandise imported or brought into the United States through concealment, and it has been held that goods are forfeitable under this section, although the United States were not in fact defrauded and although there was no intent to defraud. *United States v. Fifty Waltham Watch Movements*, 139 Fed. 291, 298 (N. D. N. Y., 1905).

Section 37 of this same statute, 1 Stat. 658, provided for the forfeiture of spirits and wines landed without inspection in this country.

In order to make effective the enforcement of the laws relating to oleomargarine, the Act of August 2, 1882, provided in its 17th Section, c. 840, 24 Stat. 212, for the forfeiture of the factory and the manufacturing apparatus used by any one engaged in carrying on the business of manufacturing oleomargarine, who defrauds or attempts to defraud the United States.

Similarly with respect to the opium trade, Section 5 of the Act of January 17, 1914, c. 10, 38 Stat. 278, provided that any opium prepared for smoking wherever found within the United States without the stamps required by Act of Congress "shall be forfeited and destroyed."

The laws relating to the registry of private yachts provided in Revised Statutes, Section 4214, as finally amended by the Act of August 20, 1912, c. 307, 37 Stat. 315, that vessels not properly licensed under the statutes relating thereto shall "be subject to the laws of the United States, and shall be liable to seizure and forfeiture for any violation of the provisions of this title."

The Act of August 3, 1894, c. 198, 28 Stat. 222, authorizing the granting of leases for property in Yellowstone National Park, provided that the lessees must observe and obey all provisions in any act of Congress and every rule, order or regulation published by the Secretary of the Interior concerning the management of the Park "under penalty of forfeiture of such lease."

In that same connection the statutes relating to the Government of the National Parks have uniformly provided for the forfeiture of guns, traps, and other apparatus used in illegal hunting in the National Parks. Section 5 of the Act of August 22, 1914, c. 264, 38 Stat. 701, applying to Glacier National Park is illustrative of these provisions.

The Anti-Trust provisions of the Wilson Tariff Act, of August 27, 1894, c. 349, 28 Stat. 570, provided in Section 76, that any property owned by any combination or pursuant to any conspiracy described in Section 73 of that statute, which was imported into the United States or was in the course of transportation from one State to another should be forfeited to the United States, "and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law."

Peculiarly appropriate to the issue raised by the present case is the host of forfeiture provisions to be found throughout the Internal Revenue Laws relating to liquor. Thus the Act of July 20, 1868, c. 186, 15 Stat. 126, required the forfeiture of every still or distilling apparatus not registered in accordance with the statutory requirements, to-

gether with all personal property in the possession or custody or under the control of the person possessing the offending still, which was to be found in the building or in any yard or enclosure connected with the building in which the still was situated.

Similar provisions calling for the forfeiture of liquor or of apparatus used in its manufacture may be found in Revised Statutes, Section 3279, 15 Stat. 132; Revised Statutes Section 3281, 15 Stat. 142; Revised Statutes Section 3289, 15 Stat. 150; Act of March 3, 1877, c. 114, 19 Stat. 395; Revised Statutes, Section 3225, 15 Stat. 142; and Revised Statutes, Section 3153, 13 Stat. 240.

The forfeiture of vessels engaged in transporting timber cut in violation of law upon the public lands of the United States was provided for in the Act of March 2, 1831, c. 66, 4 Stat. 472, and this statute was expressly upheld in *United States v. Helena*, Fed. Cases 15, 342.

A vessel entering the harbor of the United States from any foreign territory adjacent to the northern frontier of the United States and whose master fails to report at the Office of the Collector of Customs nearest to the point of entry is forfeitable under Revised Statutes, Section 3109, 14 Stat. 188.

These Statutes are but illustrative of a great many forfeiture provisions imposed by Congress, to insure the enforcement of regulatory or prohibitory legislation. As long as the judicial safeguards of due process of law surround the enforcement of these forfeiture provisions their validity has never been questioned. They amply establish the reasonableness of the selection by Congress in Section 23 of the National Prohibition Act of the cancellation of the tenant's lease as a penalty for his violation of the Prohibition Law.

As far back as *United States v. Grandy*, 3 Cranch, 337, Chief Justice Marshall held, construing the Act of December 31, 1792, that the Legislature properly could pass a statute authorizing the forfeiture of a vessel guilty of a violation of

the Revenue Laws, and that such statute might make the commission of the Act immediately operative as a forfeiture of the property to the United States (at p. 352).

The recent decision of this Court in *Goldsmith-Grant Co. v. United States*, 254 U. S. 505 (1921), in which the forfeiture of an automobile used in transporting liquor in violation of the Act of July 13, 1866, c. 184, 14 Stat. 98, 151, was sustained, again reaffirmed the power of Congress to enforce by forfeiture prohibitory legislation. Reviewing a great many decisions sustaining forfeiture statutes, this Court held that this was a reasonable means appropriate to carry out the power of Congress and that there was no denial of due process even if the ultimate sufferer had not been party to the violation. See also *United States v. One Ford Coupe Automobile*, No. 115, October Term, 1926, decided November 22, 1926. Manifestly in the present case where the appellant, the violator, is to be the ultimate sufferer by reason of the forfeiture, no violation of due process occurs when his lease is cancelled by a court of equity.

The fact that in most cases of forfeiture imposed by Act of Congress, the property forfeited enures to the benefit of the United States, while here, the cancellation of the lease causes the property to revert to the landlord presents no constitutional objection. The purpose of the statute is to deter violations of the law. The forfeiture here imposed clearly is of a penal character and in imposing it for its deterrent effect, the law is indifferent to the possible benefit to the claimant of the forfeited property.

An analogous situation was presented in *Missouri Pacific Railway Co. v. Humes*, 115 U. S. 512, in which a law of Missouri, allowing double damages to parties who had suffered injury through the loss of livestock due to the failure of Railroad Companies to erect fences as required by State Law, was challenged as repugnant to the due process clause of the 14th Amendment. The statute was sustained upon the theory that it lay within the police power of the State

to require the erection of these fences, and to insure their erection by imposing upon violators a penal liability in addition to the actual damage resulting from the wrong. The fact that the fruits of this penalty enured to the sufferer rather than to the State was held to be no objection to the laying of the penalty. Mr. Justice Field said at page 522:

"The additional damages being by way of punishment, it is clear that the amount may be thus fixed; and it is not a valid objection that the sufferer instead of the State receives them. That is a matter on which the company has nothing to say. And there can be no rational ground for contending that the statute deprives it of property without due process of law. The statute only fixes the amount of the penalty in damages proportionate to the injury inflicted. In actions for the injury the company is afforded every facility for presenting its defence. The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion."

So here, the fact that the fruits of the imposition of the penalty do not come to the United States but go to the landlord is no objection to the reasonableness of the means to which Congress has resorted to make effective its prohibitions. It is a matter wholly for legislative discretion.

A further analogy is presented by the provisions of Revised Statutes, Section 3213, being the Act of July 13, 1866, C. 184, 14 Stat. 110. This section provides:

"All suits for fines, penalties, and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, *qui tam* or otherwise, before any District Court of the United States for the District within which said fine, penalty or forfeiture may have been incurred * * *."

This section expressly authorizes a *qui tam* proceeding in which, of course, the informer would be entitled to a share in the fruits of the forfeiture visited upon the violator. No constitutional objection has ever been asserted to this form of proceeding upon the ground that the United States does not obtain all the fruits of the forfeiture. Indeed as early as *United States v. Simms*, 1 Cranch 252, Chief Justice Marshall held that a proceeding *qui tam* was appropriate under existing legislation in Virginia for enforcing the forfeiture of apparatus used for gambling purposes, the forfeiture to be recovered by any person who might sue for the same.

The Cancellation of the Lease under Section 23 Did Not Expand the Common-Law Rights of the Landlord.

As stated in the appellant's brief (p. 28), the landlord had a right under the laws of New York to repossess the premises in case of illegal use, and to prosecute either an action in ejectment or a summary proceeding to that end. Civil Practice Act, Sections 990 *et seq.*; 1410 *et seq.* This right rested not only on the express covenant of the lease but upon the implied covenant to obey the law. *United States v. Gaffney*, 10 Fed. (2d) 694, 696. The attack against the constitutionality of Section 23 becomes therefore a mere attack upon a familiar remedy and not upon the right, which the Statute does not enlarge.

The Cancellation of the Lease by a Court of Equity Does Not Violate the Seventh Amendment.

It follows that the section was within the power granted by the Eighteenth Amendment, and the only further inquiry is whether the section contravenes other provisions of the Constitution. The appellant asserts that the Seventh Amendment requiring that the right to jury trial be preserved

"in civil cases" makes Section 23 invalid if it be construed as authorizing a court of equity to cancel a lease. The first and obvious answer to this contention is that the words "in civil cases" appearing in the Seventh Amendment are used in contra-distinction to equity and admiralty jurisprudence. This was pointed out by Mr. Justice Story as far back as *Parsons v. Bedford*, 3 Peters, 433, 436.

And it is well settled that an equity court having jurisdiction of a suit in equity properly initiated before it, may be authorized by statute or may proceed without statutory authorization to determine all issues before it, although many of the questions raised would ordinarily be triable purely as cases at law. A statute so authorizing does not contravene the Seventh Amendment.

Barton v. Barbour, 104 U. S. 126, 133, 134:

"The argument is much pressed, that by leaving all questions relating to the liability of receivers in the hands of the court appointing them, persons having claims against the insolvent corporation, or the receiver, will be deprived of a trial by jury. This, it is said, is depriving a party of a constitutional right.

* * * * *

But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity.

* * * * *

So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases of law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of

equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods."

In the present case the proceeding was appropriately brought as a suit in equity in view of the plain language of Section 22, and of the ancient character of a suit in equity to abate a nuisance. It was therefore entirely appropriate for equity to take jurisdiction of the question raised by the demand for forfeiture of the lease, even if that question were one which might also have been litigated in an action of ejectment. However, as pointed out previously in this brief, a bill to cancel a lease is a familiar type of equity jurisdiction and therefore the cross-bill did not raise an issue involving purely a question of law. The case is like *Luria v. United States*, 231 U. S. 9, 27, in which the United States sought to cancel a naturalization certificate upon the ground that it had been obtained by fraud. The contention was urged that an equity proceeding to cancel the certificate amounted to a denial of the defendant's right to a trial by jury. To this Mr. Justice Van Devanter said:

"Lastly it is urged that the District Court erred in not according to the defendant a trial by jury. The claim is predicated upon the Seventh Amendment to the Constitution, which declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This, however, was not a suit at common law. The right asserted and the remedy sought were essentially equitable, not legal, and this, according to the prescribed tests made it a suit in equity. *Parsons v. Bedford*, 3 Pet. 433, 447; *Irvine v. Marshall*, 20 How. 558, 565; *Root v. Railway Company*, 105 U. S. 189, 207. In this respect it does not differ from a suit to cancel a patent for public land or letters patent for an invention. See *United States v. Stone*, 2 Wall. 525; *United States v. San Jacinto Tin Co.*, 125 U. S. 273; *United States v. Bell Telephone Co.*, 128 U. S. 315."

The Writ of Assistance included in the decree of the District Court directing the marshal to remove the tenant from the premises and to deliver possession to the landlord did not exceed the boundaries of equity jurisdiction (R., 3). It was entirely appropriate after entering a decree cancelling the lease to issue an order making that decree promptly effective. That was all the Writ of Assistance did, and the fact that some similar relief could have been obtained by an action of ejectment or a dispossession proceeding under a New York Statute, is wholly immaterial.

The foregoing argument it is respectfully submitted, answers the contentions of the appellant that Congress lacks power to interfere with State laws relating to land tenure, leases, etc. The contention would be sound were it not for the fact that here Congress was dealing with a subject over which it had plenary authority in view of the prohibitions of the Eighteenth Amendment which it was empowered specifically to enforce. Its powers thereunder clearly override local land tenure regulation. Specific powers conferred by the federal Constitution are not to be cut down by the residuum of local power retained by the States under the Tenth Amendment.

POINT IV.

The failure of the appellant to answer the cross-bill bars him from asserting a lack of equity jurisdiction upon the ground of adequate remedy at law.

The Circuit Court of Appeals properly held that the defense of lack of equity jurisdiction on the ground of adequate remedy at law was not available to the appellant because he had failed to tender such issue by any pleading on his part. He made no answer to the cross-bill at the opening of the case, but made a motion for a jury trial (R., 12) which was

denied (R., 29). Obviously this was a motion addressed solely to the discretion of the court, asking, as indeed it states, that certain issues be framed for trial by jury. In this there was no challenge of equity jurisdiction. At the close of the case (R., 133) the appellant made a motion to dismiss the proceeding upon the ground among others:

"That this proceeding is properly triable before a jury."

This motion was not open to him at that time if it be construed as a challenge to equity jurisdiction upon the ground of adequate remedy at law, because there had been a complete failure to plead this defense. No mention was made of any reason for the motion and no suggestion was advanced until the case reached the Circuit Court of Appeals that equity lacked jurisdiction on this ground.

The appellant tried the case fully without an answer. He thereby entirely barred himself from subsequently objecting in the appellate court to equity jurisdiction. As this court said in *Wylie v. Cox*, 15 How. 415, 420:

"The want of jurisdiction, if relied on by the defendants, should have been alleged by plea or answer. It is too late to raise such an objection on the hearing in the Appellate Court, unless the want of jurisdiction is apparent on the face of the bill."

In *L. & N. R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 80, 81, this Court said on the same subject:

"Where the case is one in which, under any circumstances, relief in equity may be admissible, it is too late to say that there was an adequate remedy at law only upon review proceedings."

In *Reynes v. Dumont*, 130 U. S. 354, 395, this Court said:

"The doctrine of these and similar cases is, that the court, for its own protection, may prevent matters pure-

ly cognizable at law from being drawn into chancery, at the pleasure of the parties interested; but it by no means follows, where the subject matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal that the latter can exercise no discretion in the disposition of such objection. Under the circumstances of this case, it comes altogether too late even though, if taken *in limine*, it might have been worthy of attention."

The same statement was made in *Kilbourn v. Sunderland*, 130 U. S. 505, 514.

In accord are:

Brown v. Lake Superior Iron Co. 134 U. S. 530, 535;

Tyler v. Savage, 143 U. S. 79, 97.

In the present case the objection to equity jurisdiction was asserted in the Circuit Court of Appeals in the manner condemned by these decisions. The contention was therefore not available to the appellant, because not founded upon proper pleadings and not apparent on the face of the bill, and hence the Circuit Court of Appeals was entirely right in refusing to consider the question.

It is only upon the theory that this motion challenged the constitutionality of Section 23 that the contention that the section is unconstitutional can be made. The foregoing argument demonstrates that that contention may not be made for lack of appropriate pleading.

CONCLUSION.

It is respectfully submitted that the decree appealed from was right in all respects and should be affirmed with costs.

Respectfully submitted,

JOHN W. DAVIS,
Attorney for the Appellee,
Pall Mall Realty Corporation.

January, 1927.

SUPREME COURT OF THE UNITED STATES.

No. 101.—OCTOBER TERM, 1926.

James Duignan, Appellant, <i>vs.</i> United States and Pall Mall Realty Corporation.	}	Appeal from the United States Circuit Court of Appeals for the Second Circuit.
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[April 25, 1927.]

Mr. Justice STONE delivered the opinion of the Court.

The United States filed a bill in equity in the district court for southern New York, under § 22 of the National Prohibition Act, to abate a liquor nuisance alleged to be maintained by Duignan, the appellant, upon premises occupied by him under a lease. By amended bill, the appellee, the Pall Mall Realty Corporation, the owner of the leased premises, was made a party defendant. In its answer, it admitted the allegations of the bill. By cross bill it set up its ownership of the premises, its lease to Duignan, the maintenance of a liquor nuisance by him on the premises in violation of § 21 of the National Prohibition Act, and asked that the lease be forfeited under § 23 of the Act. Appellant neither answered the cross bill nor directed any motion to it, but made application for a jury trial which was denied.

On the trial without a jury, appellant drew in question the constitutionality of the forfeiture of his leasehold as a denial of due process of law. After the trial in which the existence of the nuisance was litigated, the district court decreed the forfeiture of the lease. This was affirmed by the court of appeals for the second circuit. 4 Fed. (2d) 983. The case is properly here on appeal, Jud. Code, § 241, before amended, and the petition for certiorari, filed as a jurisdictional precaution, is denied.

At the outset, appellant denies the jurisdiction of the district court to try the issues raised by the cross bill, in the absence of diversity of citizenship. Section 23 provides: "Any violation

of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease." The right thus given to the lessor to forfeit the lease is one arising under a law of the United States and the district court had jurisdiction to determine a suit founded upon it, regardless of the citizenship of the parties. Jud. Code, § 24 (a).

Numerous other questions are raised by appellant's brief and argument, but so far as they are of substance, they are involved in or incidental to the two principal grounds urged for reversal: (1) that appellant was denied the right to a jury trial, in violation of the Seventh Amendment of the Constitution, and (2) that the forfeiture of appellant's lease is a denial of due process of law.

So far as appellant's motion for a jury trial was directed to the issues raised by the bill and answer, it was properly denied as § 22 of the National Prohibition Act authorizes the abatement of a liquor nuisance by a bill in equity filed by the United States. Cf. *Murphy v. United States*, 272 U. S. —. But it is urged, assuming the constitutionality of § 23, that section at most gives a right at law to a possessory action for the recovery of the leased premises, which is not cognizable in a court of equity, and in any case, appellant was entitled to have the issues raised by the cross bill tried by a jury.

Appellant's application for a jury was in terms a motion for an order "framing for trial by jury the issues in this action as to the occurrences of the alleged violations of the National Prohibition Act." It clearly appears from the notice of motion and the supporting affidavits that the motion was not a challenge to the equity jurisdiction of the court nor a demand for a jury trial in an action at law, such as is guaranteed by the Constitution. It was rather an application addressed to the discretion of the court sitting in equity to frame issues for a jury to aid, as stated, "in advising the court as to the credibility of the witnesses", and was made on the ground that this was "not the usual equity case, which ordinarily involves only matters of law."

The right to a jury trial may be waived where there is an appearance and participation in the trial without demanding a jury. *Kearney v. Case*, 12 Wall. 275; *Perego v. Dodge*, 163 U. S. 160, 166. Section 649 of the Revised Statutes provides that issues of fact may be tried by the court without a jury, upon written

stipulation of the parties, and that the finding of the court upon the facts shall have the same effect as the verdict of the jury. But this section does not preclude other kinds of waiver. *Kearney v. Case, supra*. Its purpose and effect, when read together with §§ 648 and 700, is to define the scope of appellate review in actions at law without a jury. Unless there is a written stipulation waiving a jury, there can be no review of the rulings on questions of law in the course of the trial or of the sufficiency of a special finding to support the judgment. See *Law v. United States*, 266 U. S. 494, 496; cf. *Fleischmann Co. v. United States*, 270 U. S. 349, 355, 356. Appellant's failure to demand a trial by a common law jury amounted, we think, to a waiver of the constitutional right, if any, now claimed.

But even if his application for a jury trial be regarded as an assertion of his constitutional right, there were no issues to be tried by a jury, as he had failed to answer the cross bill. *The Confiscation Cases*, 20 Wall. 92, 110. Hence, there was no error in the court's finding the facts supporting its judgment, without a jury. Whether issues raised by the pleadings in proceedings under § 23 must be tried by jury if seasonably demanded is a question which does not arise on this record.

Appellant on appeal for the first time challenged the equity jurisdiction of the court, urging that the remedy at law was adequate. The cancellation of appellant's lease, which was the relief sought, was a remedy competent for equity to give. The repeated holdings of the lower courts that a suit brought under § 23 is one cognizable in equity,¹ at least suggest that the suit is not so plainly at law that the court should, of its own motion, have dismissed it. Under such circumstances, objection to the equity jurisdiction not seasonably taken is waived, *Kilbourn v. Sunderland*, 130 U. S. 505, 514; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 534-536; *Perego v. Dodge, supra*, 164, especially where, as here, appellant did not answer the cross bill. For the same reason it is unnecessary for us to determine whether appellee adopted the proper procedure in seeking the forfeiture of the lease by cross bill.

¹*Grossman v. United States*, 280 Fed. 683; *United States v. Boynton*, 297 Fed. 261; *United States v. Archibald*, 4 Fed. (2d) 587; *United States v. Gaffney*, 10 Fed. (2d) 694; cf. *United States v. Schwartz*, 1 Fed. (2d) 718.

We do not consider the constitutionality of the forfeiture under § 23. The court below in enumerating the questions raised and presented made no mention of the constitutional question. The assignment of errors below did not refer specifically to it as required by the rules of that court, and so far as the record discloses, it was not presented there. See *United States v. Gaffney*, 10 Fed. (2d) 694, 696. This Court sits as a court of review. It is only in exceptional cases coming here from the Federal courts that questions not pressed or passed upon below are reviewed. See *Montana Ry. Co. v. Warren*, 137 U. S. 348, 351; *Jordan Mining Co. v. Société Anonyme Des Mines*, 164 U. S. 261, 264, 265; *Magruder v. Drury*, 235 U. S. 106, 113; *Gila Valley Ry. v. Hall*, 232 U. S. 94, 98; *Grant Bros. v. United States*, 232 U. S. 647, 660; *Ana Maria Sugar Co. v. Quinones*, 254 U. S. 245, 251; cf. *West v. Rutledge Timber Co.*, 244 U. S. 90, 99, 100; *United States v. Tennessee & Coosa R. R.*, 176 U. S. 242, 256.

Decree affirmed

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Test :

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